

No. 87-645-CFX  
Status: GRANTED

Title: F. Clark Huffman, et al., Petitioners  
v.  
Western Nuclear, Inc., et al.

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October 19, 1987

Court: United States Court of Appeals  
for the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Nickles, Peter J.

Entry	Date	Note	Proceedings and Orders
1	Oct 19 1987	G	Petition for writ of certiorari filed.
2	Nov 18 1987		Brief amici curiae of Eldorado Nuclear Limited, et al. filed.
3	Nov 18 1987		Brief amicus curiae of Australia filed.
4	Nov 18 1987		Brief amici curiae of Electric Utility Companies filed.
5	Nov 19 1987		Brief amici curiae of Wyoming, et al. filed.
6	Nov 20 1987		Brief of respondents Western Nuclear, Inc., et al. in opposition filed.
7	Nov 24 1987		DISTRIBUTED. December 11, 1987
9	Dec 8 1987	X	Reply brief of petitioners F. Clark Huffman, et al. filed.
11	Dec 16 1987		REDISTRIBUTED. January 8, 1988
12	Dec 18 1987		REDISTRIBUTED. January 8, 1988
13	Jan 11 1988		Petition GRANTED. *****
14	Feb 16 1988		Record filed.
		*	Certified copy of C. A. proceedings and original record, volumes I, II and supplemental volume I received.
15	Feb 25 1988		Brief amici curiae of Eldorado Nuclear Limited, et al. filed.
16	Feb 25 1988		Brief amicus curiae of Canada filed.
17	Feb 25 1988		Brief amici curiae of Electric Utility Companies filed.
19	Feb 25 1988		Brief of petitioners F. Clark Huffman, et al. filed.
20	Feb 25 1988		Brief amicus curiae of Australia filed.
21	Feb 25 1988		Joint appendix filed.
22	Mar 11 1988		SET FOR ARGUMENT, Wednesday, April 27, 1988. (2nd case).
23	Mar 30 1988		Brief amici curiae of Arizona, et al. filed.
24	Mar 30 1988		Brief amici curiae of U.S. Senators Bingaman, et al. filed.
25	Mar 30 1988	X	Brief of respondents Western Nuclear, Inc., et al. filed.
26	Mar 30 1988	X	Brief amicus curiae of National Taxpayers Union filed.
27	Mar 31 1988		CIRCULATED.
28	Apr 20 1988	X	Reply brief of petitioners F. Clark Huffman, et al. filed.
29	Apr 27 1988		ARGUED.

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Supreme Court, U.S.  
FILED

No.

OCT 19 1987

JOSEPH F. SPANIOLO, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

F. CLARK HUFFMAN, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC., ET AL.

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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#### QUESTION PRESENTED

Under Section 161(v) of the Atomic Energy Act of 1954 (42 U.S.C. 2201(v)), the Department of Energy (DOE) sells uranium enrichment services to electric utilities that need enriched uranium as reactor fuel. Section 2201(v) provides that DOE shall restrict its enrichment of foreign-source uranium for domestic use "to the extent necessary to assure the maintenance of a viable domestic uranium industry." The Department of Energy has determined that the domestic uranium industry is not viable and that the imposition of restrictions on the enrichment of foreign uranium would not make it viable.

The question is whether Section 2201(v) requires the Department of Energy to restrict enrichment of foreign uranium whenever the domestic uranium is not viable, whether or not the imposition of such restrictions would make the domestic industry viable.

## PARTIES TO THE PROCEEDING

The petitioners are John S. Herrington, the Secretary of Energy, and F. Clark Huffman, Sherry E. Peske, Philip G. Sewell, James W. Vaughn and Joseph F. Salgado, all of whom are officers or employees of the Department of Energy sued in their official capacities, and the United States Department of Energy.

The respondents are Western Nuclear, Inc., Energy Fuels, Inc., and Uranium Resources, Inc.

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F. CLARK HUFFMAN, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC., ET AL.

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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The Solicitor General, on behalf of the Department of Energy, the Secretary of Energy, and officers and employees of the Department of Energy sued in their official capacities, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 825 F.2d 1430. The order of the district court (App., *infra*, 22a-24a) is unreported.

**JURISDICTION**

The decision of the court of appeals (App., *infra*, 1a) was entered on July 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

**STATUTORY PROVISION INVOLVED**

Section 161(v) of the Atomic Energy Act of 1954 (42 U.S.C. 2201(v)) provides:

(1)



Contracts for production or enrichment of special nuclear material; domestic licensees; other nations; prices; materials of foreign origin; criteria for availability of services under this subsection; Congressional review

[In the performance of its function the Commission is authorized to]

(A) enter into contracts with persons licensed under Section 2073, 2093, 2133 or 2134 of this title for such periods of time as the Commission may deem necessary or desirable to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission; and

(B) enter into contracts to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission in accordance with and within the period of an agreement for cooperation arranged pursuant to Section 2153 of this title while comparable services are made available pursuant to paragraph (A) of this subsection:

*Provided*, That (i) prices for services under paragraph (A) of this subsection shall be established on a non-discriminatory basis; (ii) prices for services under paragraph (B) of this subsection shall be no less than prices under paragraph (A) of this subsection; and (iii) any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time: *And provided further*, That the Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the

jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States: *Provided*, That before the Commission establishes such criteria, the proposed criteria shall be submitted to the Joint Committee, and a period of forty-five days shall elapse while Congress is in session (in computing the forty-five days there shall be excluded the days in which either House is not in session because of adjournment for more than three days) unless the Joint Committee by resolution in writing waives the conditions of, or all or any portion of, such forty-five-day period.

#### STATEMENT

This case presents a question of statutory interpretation of great practical importance. Section 161v of the Atomic Energy Act of 1954, 42 U.S.C. 2201(v) (Section 2201(v)), requires the Department of Energy (DOE) to restrict its provision of enrichment services for foreign uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry." The Secretary has determined that the domestic uranium industry is not viable, and that there is *no* level of reduced enrichment services for foreign uranium that would make it viable. Consequently, the Secretary has interpreted Section 2201(v) as not requiring—or authorizing—any restriction on enrichment of foreign uranium. The lower courts disagreed, holding that once the Secretary finds that the domestic uranium industry is not viable, he must automatically terminate the

provision of *all* enrichment services to foreign uranium, even if this will do nothing to revive the domestic industry.

1. a. The principal civilian use of uranium is as fuel for nuclear reactors operated by electric utilities. Because natural uranium does not contain enough of the highly fissionable isotope U-235 to serve as reactor fuel, it must undergo a process known as enrichment. The enrichment process for commercial reactor fuel increases uranium's U-235 content from approximately 1% to approximately 3%. App., *infra*, 4a.

Under the Atomic Energy Act of 1954 (ch. 1073, § 158, 68 Stat. 948 (42 U.S.C. 2188)) as originally adopted, the Atomic Energy Commission (AEC) was given a monopoly over the ownership of special nuclear materials, including enriched uranium.<sup>1</sup> Utilities operating commercial reactors thus were required to lease their fuel from the AEC. App., *infra*, 3a. In 1964, Congress eliminated this government monopoly on ownership of nuclear fuel. The Private Ownership of Special Nuclear Materials Act (the Private Ownership Act) (Pub. L. No. 88-489, 78 Stat. 602) authorized non-governmental persons to own reactor fuel, subject to strict licensing requirements and regulatory controls. The Private Ownership Act did not, however, eliminate the government's de facto monopoly in the provision of enrichment services (§ 16, 78 Stat. 606; see S. Rep. 1325, 88th Cong., 2d Sess. 2 (1966) [hereinafter Private Ownership Act Report]). Within the United States, the provision of enrichment services remains exclusively in the hands of the federal government (App., *infra*, 4a).

When the Private Ownership Act was passed, imports of uranium were insignificant. But both the AEC and the

<sup>1</sup> "Special nuclear material" is defined in 42 U.S.C. 2014(aa) and includes plutonium and enriched uranium. The term "source material" includes unenriched uranium or thorium (42 U.S.C. 2014(z)).

Joint Committee on Atomic Energy were concerned that imports might someday displace the domestic uranium industry, and that this could have a detrimental effect on the nation's energy and national security needs (Private Ownership Act Report 30). Accordingly, the Private Ownership Act included a proviso requiring the AEC to restrict enrichment of foreign-source uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry" (42 U.S.C. 2201(v)).

No foreign uranium was enriched for domestic use in the early years of the AEC's enrichment services program (see 31 Fed. Reg. 16479 (1966) (initial criteria providing that foreign-source uranium would not be enriched for domestic use)). However, during the 1970's, the AEC studied the advisability of phasing out these restrictions. In 1974, after soliciting comments on such a proposal (38 Fed. Reg. 32595 (1973)), the AEC amended its enrichment services criteria by establishing a schedule under which by 1984 all restrictions on enriching imported uranium would be eliminated (39 Fed. Reg. 38016 (1974)). The criteria permitting the enrichment of foreign uranium were reported to Congress pursuant to Section 2201(v) and Congress took no adverse action. The scheduled phase-out of restrictions took place as planned, and DOE has not since reimposed any restrictions on enrichment of foreign uranium.<sup>2</sup>

b. In the late 1970's and early 1980's, the position of the domestic uranium industry deteriorated rapidly and dramatically (App., *infra*, 5a). As one report put it, the industry suffered "a collapse that by industrial standards

<sup>2</sup> The AEC was abolished in 1974 (Energy Reorganization Act of 1974, Pub. L. No. 93-438, § 104(a), 88 Stat. 1237). Its "licensing and related regulatory functions" were transferred to the Nuclear Regulatory Commission (NRC) (§ 201(f), 88 Stat. 1243). All other AEC functions were transferred to the Energy Research and Development agency, the predecessor of the Department of Energy (DOE) (§ 104(c), 88 Stat. 1237).



occurred practically overnight" (Blundell, *U.S. Uranium Mines, Thriving 5 Years Ago, Are Nearing Extinction*, Wall St. J., June 12, 1985, at 1). The main cause of this development was "a classic oversupply situation," brought about by a combination of excess capacity and reduced demand (*Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports: Hearing Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 15 (1981) (statement of Shelby Brewer, Assistant Secretary of Energy for Nuclear Energy) [hereinafter *1981 Hearing*]). On the one hand, exploration and other investment increased significantly in the 1970's, in response to optimistic projections of future demand (*id.* at 19-20 (charts 2, 3, 4, showing peak and decline of exploration, employment, and capital expenditures)). But just as supply was increasing, developments threatening the economic feasibility of nuclear power generation, followed by heightened concerns over reactor safety triggered by the Three Mile Island incident, led to a wave of "reactor delays and cancellations, and [a] lack of new reactor orders" (*id.* at 12).

The result was a precipitous decline in the price of uranium ore. In 1981, the Edison Electric Institute, a utility trade association, reported that the spot market price of uranium had declined from \$43.25 per pound in 1979 to \$23.50 per pound (*1981 Hearing* 148 (statement of Edison Electric Institute)). By 1984, the spot market price had fallen to \$15.50 per pound, which the industry informed DOE was less than one-half the conventional United States producers' average cost of production (51 Fed. Reg. 27132, 27136 n.12 (1986)). The spot market price has not recovered appreciably since then.<sup>3</sup>

<sup>3</sup> The current spot market price was \$16.65 per pound on August 31, 1987 (NUEXCO Monthly Report No. 229, at 34 (Sept. 1987)).

Two other important developments contributed to the decline of the domestic uranium industry during this period. First, the United States lost its monopoly as the only provider of enrichment services for commercial nuclear reactors. Beginning in the mid-1970's, two European consortia and the Soviet Union began to supply foreign nuclear facilities with enriched uranium, produced largely from foreign-source ore (51 Fed. Reg. 3624, 3625, 3627 (1986)). By the 1980's, enriched uranium from foreign sources also was being imported into the United States, reaching a level of 4.9% of total requirements in 1984 (Energy Info. Admin., Dep't of Energy, *Domestic Uranium Mining and Milling Industry: 1985 Viability Assessment* xii (1986) [hereinafter *1985 Viability Assessment*]). Indeed, DOE suddenly found that it had become the highest priced supplier of enrichment services for commercial reactors, charging \$138 per separative work unit (SWU)<sup>4</sup> in 1984, whereas its foreign competitors were charging \$105-\$115 per SWU (51 Fed. Reg. 3625 & n.2 (1986)). "As a result, DOE's foreign competitors \* \* \* captured about 60 percent of the total foreign market and \* \* \* made significant inroads into the domestic markets" (*id.* at 3625).

Second, as part of the same imbalance of supply and demand that crippled the domestic uranium industry, many utilities found themselves committed to long-term contracts to purchase enrichment services that they no longer needed. DOE has estimated that these commitments gave rise to a surplus of enriched uranium amounting to about

<sup>4</sup> A SWU is a measure of the production capacity of uranium enrichment plants and hence a unit in which enrichment services can be measured (51 Fed. Reg. 3625 & n.1 (1986)). SWU's "measure the amount of effort expended to separate a given amount of natural uranium into two components—one having a higher concentration of fissionable uranium-235" (*id.* at 3625 n.1).

39 million SWU's by 1984. This in turn "led to the emergence of a secondary market in which utilities have been willing to sell their surplus SWU's to other utilities at discounts of \$30 per SWU and more" (51 Fed. Reg. 3625 (1986)).

DOE sought to deal with the crisis in the domestic uranium industry in different ways. In an effort to stimulate demand, the Department continued to promote the expanded use of commercial nuclear energy (see *1981 Hearing* 12-13). And in an attempt to minimize the market's perception of oversupply, DOE stated that it would not draw down or sell off the considerable stockpile of uranium under its control (e.g., *id.* at 13). But the Department has no statutory authority to regulate either the importation of *enriched* uranium, or the secondary market in *enriched* uranium. Both of these sources, which offer direct competitive substitutes for the product of the domestic uranium industry, are subject to the exclusive oversight of the Nuclear Regulatory Commission (NRC).<sup>5</sup> The only other regulatory tool available to DOE is Section 2201(v), but the Department has consistently concluded that any effort to restrict the provision of enrichment services to foreign uranium would be at best futile, and at worst counterproductive. (See pages 8-12, *infra.*)

c. In 1981 Congress conducted hearings on the problems of the domestic uranium industry (see *1981 Hearing*). DOE's representative testified that "[a]lthough there have been cutbacks in exploration and production and thus in employment, foreign uranium, we feel, has not been the

<sup>5</sup> The AEC's authority to license the domestic sale or the importation of special nuclear material (see 42 U.S.C. 2073(a)) is now vested in the NRC. The NRC is required to deny any such license that "would be inimical to the common defense and security or the health and safety of the public" (42 U.S.C. 2099). Any authority under the Atomic Energy Act to restrict sales of enriched uranium on the secondary market or uranium imports would have to derive from that provision.

central cause of this problem" (*id.* at 12). Indeed, imports at that time were not a major factor in the market, accounting for only 10% of deliveries in 1980 (*id.* at 16).<sup>6</sup> Assistant Secretary Brewer therefore testified that DOE did not believe there was any need to change the planned phase-out of enrichment restrictions the AEC had adopted in 1974 (*id.* at 18).

In 1982, Congress again dealt with the issue of uranium imports, this time while considering the reauthorization of the Nuclear Regulatory Commission. Significantly, Congress rejected a proposal that would have required DOE, when uranium imports reached a level of 37.5%, to revise its enrichment criteria "so as to encourage the use of domestic origin uranium in domestic nuclear powerplants" (128 Cong. Rec. S13054 (daily ed. Oct. 1, 1982)). Instead, Congress enacted a new measure, codified at 42 U.S.C. 2210b, that set forth a series of reporting requirements to ensure that Congress could monitor the condition of the domestic industry, and that already-existing trade and national security statutes would be enforced with respect to uranium imports. Specifically, Section 2210b required the Secretary to promulgate criteria for assessing the viability of the domestic uranium industry, set forth eight statutory criteria that the Secretary was to consider in making such a determination,<sup>7</sup> and directed the Secretary to submit

<sup>6</sup> Imports have been at higher levels in succeeding years. "Natural (unenriched) uranium imports in 1982, 1983, 1984, and 1985 represented, respectively, 51.7, 25.9, 39.2 and 34.4 percent of U.S. requirements" (1985 *Viability Assessment* at xii).

<sup>7</sup> The statute (42 U.S.C. 2210b(c)) provides:

**Criteria for monitoring and reporting requirements**

The criteria referred to in subsection (a) of this section shall also include, but not be limited to—

- (1) an assessment of whether executed contracts or options for source material or special nuclear material will result in greater than 37½ percent of actual or projected domestic



annual reports on the viability of the domestic uranium industry to both the President and the Congress.

Pursuant to Section 2210b, the Secretary issued criteria for determining the viability of the domestic uranium industry (10 C.F.R. Pt. 761). Elaborating on the factors specified by Congress, the Secretary defined viability primarily in terms of "the extent to which the domestic mining and milling uranium industry will be capable, at any particular time, of supplying the needs of the domestic nuclear power industry under a variety of hypothetical conditions" (48 Fed. Reg. 45747 (1983)). Although the financial condition of the domestic uranium industry was one criterion to be examined, the Secretary made it clear that this was not the end of the inquiry. Instead, the focus was on the capacity of the domestic industry to supply domestic generating facilities in the event of various

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uranium requirements for any two-consecutive-year period being supplied by source material or special nuclear material from foreign sources;

(2) projections of uranium requirements and inventories of domestic utilities for a 10 year period;

(3) present and probable future use of the domestic market by foreign imports;

(4) whether domestic economic reserves can supply all future needs for a future 10 year period;

(5) present and projected domestic uranium exploration expenditures and plans;

(6) present and projected employment and capital investment in the uranium industry;

(7) the level of domestic uranium production capacity sufficient to meet projected domestic nuclear power needs for a 10 year period; and

(8) a projection of domestic uranium production and uranium price levels which will be in effect under various assumptions with respect to imports.

future contingencies, such as an interruption of imports. See *1985 Viability Assessment* at x, 55-62 (evaluation of likely effects of supply interruptions).

In December 1984, the Secretary made his first viability finding pursuant to Section 2210b and the DOE criteria. The Secretary concluded that the domestic industry had been viable in 1983. In September 1985, however, he determined that in 1984 the industry was *not* viable. See *1985 Viability Assessment* at ix. In December 1986, the Secretary found that the domestic industry was not viable in 1985.

d. Four months after the Secretary's initial determination that the domestic uranium industry was not viable, the Secretary initiated a rulemaking to revise the criteria under which enrichment services are offered (see 10 C.F.R. Pt. 762). The notice of proposed rulemaking specifically addressed the question whether the depressed condition of the domestic industry required the Secretary to impose restrictions on the enrichment of foreign-source uranium under Section 2201(v) (51 Fed. Reg. 3624 (1986) (initiation of rulemaking)). The notice indicated that the Secretary proposed not to restrict the enrichment of foreign uranium, because he believed that "[i]mport restrictions on foreign uranium would not assure the viability of the domestic mining and milling industry" (*id.* at 3627).

After extensive comment, the Secretary adopted final revised criteria that did not restrict enrichment of foreign uranium (51 Fed. Reg. 27132 (1986)). The explanation of that decision addressed both the legal issue in this case, which had been raised by comments from the domestic uranium industry, and the question whether restrictions on the enrichment of foreign uranium would in fact assure

the viability of the domestic uranium industry. The Secretary adhered to the legal view that "[t]he plain language of the statute makes clear that restrictions are not to be imposed automatically if the domestic industry is non-viable, but only if they are needed to, and in fact, will assure the maintenance of a viable domestic uranium industry" (*id.* at 27134).

On the factual question, the Secretary concluded that "restrictions would [not] assure the viability of the domestic mining and milling industry" (51 Fed. Reg. 27135 (1986)). The Secretary again found that the domestic industry's difficulties arose from "structural weaknesses," chiefly the collapse in demand that had led to a situation in which "the market simply will not sustain a price for [uranium] that enables the industry to recover its costs of production" (*ibid.*). Restrictions on enrichment would do nothing to address those basic difficulties (*ibid.*). Moreover, the Secretary determined that restrictions on enrichment would not protect domestic producers from foreign competition because of DOE's lack of market power in the market for enrichment services: "[w]hile DOE is the only provider of uranium enrichment services in the United States, DOE nonetheless lacks 'market power' because enrichment services are available, at comparable or lower costs, from foreign sources" (*ibid.*)

Having found that imposition of restrictions on enrichment would not assure the viability of the domestic uranium industry, the Secretary went on to examine the likely effects of such restrictions. He concluded that "restricting DOE's ability to enrich foreign uranium is likely to be counterproductive and to further damage the U.S. mining industry" (51 Fed. Reg. 27136 (1986)). Accordingly, the Secretary adopted final revisions to the enrichment criteria that do not restrict enrichment of foreign uranium.

2. a. Respondents, three domestic uranium mining and milling companies, brought this lawsuit in the United States District Court for the District of Colorado on December 7, 1984. The complaint challenged a number of DOE policies and alleged practices. At issue in this petition is Count I,<sup>8</sup> which claimed that DOE's failure to impose restrictions on the enrichment of foreign uranium is unlawful. In their summary judgment motion, respondents alleged that the only material facts were that the domestic industry is not viable and that DOE had not imposed restrictions on enrichment of foreign uranium. On those facts, respondents claimed that they were entitled to judgment as a matter of law. Respondents' Motion for Summary Judgment as to Count I. Initially, respondents asked the district court to order DOE to undertake a rulemaking to determine the appropriate level of restrictions. Later, however, they asked the district court to issue an order imposing its own restriction levels. Petitioners submitted a cross-motion for summary judgment.<sup>9</sup>

On June 5, 1986, the district court granted respondents' motion for summary judgment. In an oral explanation of its decision to grant respondents summary judgment on Count I, the court offered the view that Section 2201(v) requires the imposition of restrictions whenever the domestic industry is not viable, regardless of whether such restrictions would restore the viability of the industry: "To me [the statute] says that the agency \* \* \* shall not offer [enrichment] services for source or special nuclear

<sup>8</sup> The court of appeals mistakenly refers to the issue in this case as Count IV (App., *infra*, 14a).

<sup>9</sup> The Secretary commenced the 1986 rulemaking described in this petition while the suit was proceeding in the district court. The final rule was adopted after the district court issued its order, while that order was stayed by the court of appeals. 51 Fed. Reg. 27134 n.4 (1986). This petition does not involve a direct challenge to the revised criteria adopted in the rulemaking.



materials of foreign origin—period” (App., *infra*, 25a). The district court entered an order requiring DOE to limit its enrichment of foreign uranium to 25% of all materials enriched between June 6, 1986 and December 31, 1986, and imposing a total ban on enrichment of foreign uranium beginning January 1, 1987 (*id.* at 23a). The court further ordered DOE to commence a rulemaking to establish criteria for providing enrichment services that would “assure the maintenance of a viable domestic uranium industry” (*ibid.*).<sup>10</sup>

b. Petitioners appealed to the United States Court of Appeals for the Tenth Circuit, and at the same time asked the district court for a stay of its order. When the district court did not act on that request, petitioners moved for a stay from the court of appeals, which was granted on July 21, 1986.<sup>11</sup>

<sup>10</sup> The court stated that “[i]f the Department believes that criteria less restrictive than those imposed by this order would assure the maintenance of a viable domestic uranium industry, then the Department shall clearly articulate its reasons for such a position” (App., *infra*, 23a). The court thus recognized that Section 2201(v) affords the Secretary discretion in setting the appropriate limitations in the circumstances when the statute applies. But the court’s order does *not* permit the Secretary to do what he believes is clearly contemplated by the statutory language—impose *no* restrictions when it is impossible, by limiting enrichment services, to assure the viability of the domestic uranium industry.

<sup>11</sup> While this case was pending in the court of appeals Congress adopted a continuing resolution funding DOE and other agencies for the fiscal year that ended on September 30, 1987. That statute contained a provision expressly authorizing DOE to continue to enrich foreign uranium until this lawsuit comes to “final judgment.” Pub. L. No. 99-500, § 305, 100 Stat. 1783-209.

On July 20, 1987, the court of appeals issued its decision, affirming the district court’s grant of summary judgment on this issue (App., *infra*, 1a-21a).<sup>12</sup> The court of appeals noted that the parties agreed that the domestic uranium industry is not now viable (*id.* at 14a). Treating the issue under Section 2201(v) as one of statutory construction, the court rejected the Secretary’s argument that the phrase “to the extent necessary to assure the maintenance of a viable domestic uranium industry” means that restrictions need not be imposed when they will not assure the maintenance of a viable domestic industry. Instead, the court found that the statute “instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed and become increasingly aggressive, to the point of 100% restriction, until the domestic industry is rejuvenated and becomes viable” (App., *infra*, 17a). According to the Tenth Circuit, Section 2201(v) “does not provide that increasingly stiffer restrictions are required only to the point that DOE determines that such restrictions will not resuscitate the industry” (App., *infra*, 17a-18a). At petitioners’ request, the Tenth Circuit has issued a stay of its mandate that will continue until this petition is disposed of.

#### REASONS FOR GRANTING THE PETITION

The decision below is seriously flawed. It violates the clear meaning of Section 2201(v), conflicts with controlling authority of this Court concerning agency interpreta-

<sup>12</sup> The court of appeals also reviewed the district court’s decision on another count of the complaint attacking aspects of DOE’s enrichment services contracts not directly concerned with enrichment of foreign uranium. The court of appeals remanded that issue for further fact-finding to determine whether respondents had standing to maintain their claim. App., *infra*, 6a-14a. This part of the court of appeals’ judgment is not challenged by this petition.

tions of statutes, rests on factual premises which directly contradict the findings of the Secretary of Energy, and threatens grave injury to the interests of the United States. Although the decision below is not in conflict with any other decision, it is highly unlikely that a conflict will develop, given that the district court's order in effect subjects DOE to a nationwide injunction prohibiting it from enriching foreign-source uranium for use in domestic commercial reactors.<sup>13</sup> Petitioners therefore submit that review by this Court is warranted.

1. a. Section 2201(v) directs DOE to restrict enrichment of foreign uranium in one circumstance and one circumstance only: when it is "necessary to assure the maintenance of a viable domestic uranium industry." The statute does not command, or indeed permit, the imposition of restrictions under any other set of circumstances.

The statute thus prescribes different responses on the part of the Secretary, depending on the underlying conditions in the uranium market. If the domestic industry is viable, but enrichment of foreign-source uranium might threaten its continued viability, then the Secretary is directed to impose restrictions on the enrichment of foreign uranium. Or, if the domestic industry is not viable, but restrictions on the enrichment of foreign uranium would restore it to viability, then the Secretary is also required to impose such restrictions. On the other hand, if the domestic industry is viable, and no restrictions on enrichment of foreign-source uranium are necessary to

<sup>13</sup> The district court's order requires DOE to refuse to enrich all foreign uranium intended for domestic use (App., *infra*, 23a). It thus has the effect of a nationwide injunction. DOE therefore cannot litigate the issue in the other courts of appeals and "gain the benefit of adjudication by different courts in different factual contexts" (*Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (discussing difficulties posed by nationwide class actions)). Petitioners' only option is to seek review in this Court.

assure its continued viability, then the statute does *not* authorize the Secretary to restrict enrichment of foreign-source uranium. Similarly, if the industry is not viable, and no degree of restrictions on enrichment of foreign uranium would make it viable, then the statute again does *not* authorize the Secretary to impose restrictions on the enrichment of foreign uranium.

The Secretary has determined that the domestic uranium industry is not viable, and that no degree of restriction of enrichment services will render it viable (51 Fed. Reg. 27135 (1986)). Consequently, the condition precedent for imposing restrictions on the enrichment of foreign-source uranium—a finding that such restrictions are "necessary to assure the maintenance of a viable domestic industry"—is not satisfied, and the statute, by its own terms, simply does not apply.

The court of appeals rejected the Secretary's interpretation of the statute, purporting to find it inconsistent with the "unambiguous" language of Congress (App., *infra*, 17a). According to that court, the statute's use of the mandatory word "shall" indicates that the Secretary must impose restrictions on enrichment of foreign uranium whenever the domestic industry is not viable. In the court's view, the qualifying phrase, "to the extent necessary to assure the maintenance of a viable domestic uranium industry," simply "informs the DOE of the *amount* of restriction required; it does not provide a scenario in which the DOE is excused from restricting foreign enrichment notwithstanding a nonviable domestic industry" (*ibid.* (emphasis in original)).

The court of appeals did not enforce the unambiguous language of Section 2201(v). It rewrote the statute. The statute sets forth one and only one condition triggering the Secretary's duty to restrict enrichment of foreign uranium: a finding that such a restriction is necessary to "assure the maintenance of a viable domestic uranium industry."



Under the court of appeals' interpretation, however, the statute contains in effect two conditions triggering the requirement to restrict enrichment services. As the lower court construed the statute, the Secretary must impose restrictions on the enrichment of foreign uranium *either* when it is necessary to assure the maintenance of a viable domestic uranium industry, *or* when the domestic uranium industry is not viable. The statute, however, contains only one condition; to construe the statute as imposing some other condition is to engage not in interpretation but in judicial amendment.

The legislative history supports this conclusion. There is no suggestion in that history that Congress thought it was creating a mechanical rule that would require the Secretary to impose a "100% restriction" under certain circumstances. The statute directs the Secretary to limit the enrichment of foreign uranium "to the extent necessary" to assure the viability of domestic producers—language that suggests the exercise of discretion. The Joint Committee, in explaining the new provision, described it as a "flexible restriction" that would allow the agency "to survey periodically the condition of the domestic and world uranium market and to offer \* \* \* enrichment services on a basis which will assure, *in its opinion*, the maintenance of a viable domestic uranium industry" (Private Ownership Act Report 31 (emphasis supplied)). This clearly suggests that Section 2201(v) was thought of as a standard calling for the exercise of judgment by the Secretary, not as an automatic cutoff that would apply regardless of the Secretary's findings about underlying market conditions.

Under the court of appeals' construction, however, once the Secretary finds the domestic industry is not viable, "restrictions on enrichment of foreign-source uranium must be imposed and must become increasingly aggressive, to the point of 100% restriction" (App., *infra*, 17a). This mechanical rule finds no support in the

legislative history, and ignores the usual relationship between Congress and the Executive, in which expert agencies apply congressional policy to changing facts (see, e.g., *United States v. Shimer*, 367 U.S. 374, 382 (1961)).

Indeed, the construction imposed by the court of appeals leads to absurd results. If, for example, the Secretary had found that the domestic uranium industry was not viable because all American uranium reserves had been exhausted, the interpretation adopted by the court of appeals would nevertheless require DOE to cease all enrichment of foreign uranium. But if there were no domestic uranium to enrich, and DOE was barred from enriching foreign uranium, then DOE would have no choice but to close its doors. Presumably, the fuel needs of American nuclear power plants would then have to be satisfied by importing foreign uranium *enriched* elsewhere—in Europe or the Soviet Union—while DOE's enrichment facilities stood idle.

b. The text and legislative history of Section 2201(v) compel the conclusion reached by DOE: restrictions are required only when they would assure the maintenance of a viable domestic uranium industry. If there were any difficulty in the interpretation of Section 2201(v), however, the court of appeals should have deferred to the considered views of the Secretary rather than simply imposing its own preferred reading. As this Court has explained, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute" (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (footnote omitted)).

In this respect, the case is controlled by *Young v. Community Nutrition Institute*, No. 85-664 (June 17, 1986). There, the FDA's decision not to promulgate regulations limiting the quantity of a certain carcinogen present in

foods was challenged. The FDA's statutory mandate, drawn in words that parallel the language of Section 2201(v), stated that the Administrator "shall promulgate regulations limiting the quantity [of such substances] to such extent as he finds necessary for the protection of public health." Like the lower courts here, the respondents in *Young* "view[ed] the word 'shall' as unqualified," and argued that the phrase "to such extent as he finds necessary" gave the agency "discretion in setting the particular tolerance level, but not in deciding whether to set a tolerance level at all" (slip op. 5). Rejecting that argument, this Court deferred to the FDA's interpretation of the statute, which was "that the phrase 'to such extent as he finds necessary for the protection of public health' \* \* \* modifies the word 'shall' " (*ibid.*). This agency construction, the Court held, was "sufficiently rational to preclude a court from substituting its judgment for that of the FDA" (*id.* at 7).

The decision below cannot be squared with this Court's holding in *Young*. In *Young*, the Court found that "the phrasing" of the statute at issue was "ambiguous" because the decisive "appositive phrase"—"to such extent as he finds necessary"—was "free-floating" (slip op. 6). In Section 2201(v), however, the phrase "to the extent necessary to assure the maintenance of a viable domestic uranium industry" appears as a prefix to the word "shall," and is clearly the condition precedent of the statutory obligation. Moreover, in *Young* either of the two competing constructions could have been adopted without "endors[ing] an absurd result" whereas, here, the operation of Section 2201(v) would only be "sensible" if DOE's interpretation is upheld (slip op. 7). Finally, the legislative history of the statute at issue in *Young* "provide[d] no single view" about the nature of the decision that was delegated to the agency (*ibid.*). In contrast, the legislative history of Section 2201(v) strongly supports the construction that DOE has

given to the statutory provision. Accordingly, this Court's disposition of the much closer question in *Young* necessarily requires deference to DOE's construction of Section 2201(v).<sup>14</sup>

2. The court of appeals appears to have disagreed with the Secretary's interpretation of Section 2201(v) in part because it implicitly disagreed with—or simply ignored—the Secretary's findings about the state of the domestic uranium industry. The court found that Section 2201(v) "instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed \* \* \* until the domestic industry is rejuvenated and becomes viable" (App., *infra*, 17a (emphasis supplied)). This clearly implies that restrictions on the enrichment of foreign uranium under present market conditions *would* revive the domestic industry—which is exactly contrary to what the Secretary found. Later, the court opined that "DOE cannot accomplish its statutory purpose—the maintenance of a viable domestic uranium industry—without imposing

<sup>14</sup> The court of appeals appears to have misunderstood DOE's argument based on *Young*, suggesting that the Secretary was asserting that he had discretion to "abandon the statutory goal" (App., *infra*, 18a). But DOE has never maintained that it has discretion to ignore Section 2201(v). On the contrary, in response to comments on the 1986 rulemaking, the Secretary found that "[t]he plain language of the statute makes clear that restrictions are not to be imposed automatically if the domestic mining industry is non-viable, but only if they are needed to, and in fact, will assure the maintenance of a viable domestic industry" (51 Fed. Reg. 27134 (1986)). Thus, the Secretary does not argue, as the court of appeals seems to have believed, that DOE need not comply with Section 2201(v) because "this policy is not wise in the present uranium market" (App., *infra*, 18a). The question in this case is not whether the statute is wise but rather what it means.



restrictions on enrichment of foreign uranium" (*id.* at 18a). This too suggests, contrary to the Secretary, that restrictions on enrichment of foreign-source uranium would somehow further the statutory purpose. In a similar vein, the court asserted that "DOE may determine how much restriction is required to ensure viability, but it cannot decide not to impose restrictions when the industry is not viable. It must continue to increase restrictions *until the domestic industry becomes viable*" (*ibid.* (emphasis supplied)). Again, this suggests a vision of the facts which is exactly the opposite of what the Secretary found.

Perhaps if the domestic uranium industry did not have enormous excess capacity, if DOE had a complete monopoly on enrichment services and if there were no secondary market for enriched uranium, then the court of appeals might have been warranted in assuming that a "100% restriction" on the enrichment of foreign uranium could revive the domestic industry. But that is not the current state of the domestic uranium market, as determined by the Secretary. On the contrary, the Secretary found that because of excess capacity and severely depressed prices, competition from foreign sources of enriched uranium, and an active secondary market in enriched uranium, any restriction on the provision of enrichment services to foreign uranium would provide at best only transitory relief. 51 Fed. Reg. 27135-27138 (1986).<sup>15</sup>

<sup>15</sup> It is possible (though by no means certain) that in the short term the imposition of restrictions would lead to increased consumption of domestic uranium, although DOE believes that any such benefit would not be enough to make the industry viable (51 Fed. Reg. 27136 (1986)). This possibility, which would lead to temporarily increased income for respondents, is sufficient, we believe, to satisfy the "distinct and palpable injury" requirement of Article III (*Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

It is of course elementary that "[o]n summary judgment the inferences to be drawn from the underlying facts \* \* \* must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Ind. Co. v. Zenith Radio*, No. 83-2004 (Mar. 26, 1986), slip op. 12 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). This principle applies with equal force to issues of disputed fact about market structures or other economic conditions (see, e.g., *United States v. Diebold, supra*). If the court of appeals was not convinced by the Secretary's analysis of conditions in the domestic uranium industry, the proper course, at most, would have been to reverse the district court's decision granting summary judgment and either to remand for further proceedings to determine whether the Secretary's findings were arbitrary, capricious or an abuse of discretion, or to remand with instructions to direct the Secretary to conduct a further investigation into the conditions of the domestic uranium industry.<sup>16</sup> It was manifestly improper, however, for the court of appeals silently to substitute its views of the domestic uranium market for the findings of the Secretary, and then to use those views, which have no support in the record, as part of the justification for a mechanical imposition of restrictions under Section 2201(v).

3. The court of appeals' decision affirms an injunction which prohibits DOE from providing any enrichment services to foreign uranium. This order, if left unreviewed, will have very serious adverse consequences for electric

<sup>16</sup> Respondents have never challenged the Secretary's determination that restrictions would not assure the maintenance of a viable domestic uranium industry. Rather, they have argued that as a matter of law the Secretary is required to impose restrictions whenever the industry is not viable, whether or not those restrictions would accomplish (or even further) the statutory goal. In the absence of any such challenge to the Secretary's findings, it would in fact have been appropriate to grant *petitioners'* motion for summary judgment.

utilities, DOE's enrichment program, and United States trade, nuclear cooperation and nonproliferation policies.

a. The district court's injunction confronts utilities who have agreed to purchase foreign uranium feed stock<sup>17</sup> and have contracted with DOE for enrichment services with a dilemma. DOE's enrichment contracts impose cancellation penalties for failure to use contracted-for services (see 10 C.F.R. 762.10). Thus, unless these utilities can break their contracts with DOE, they will either have to obtain domestic uranium for DOE to enrich, or pay the cancellation penalties and obtain enrichment services elsewhere. If the utilities go forward with DOE enrichment, they either will have to dispose of the foreign uranium they have purchased or break their purchase agreements.<sup>18</sup>

b. The district court's order also poses a grave danger to DOE's commercial enrichment operation. Enrichment fees from domestic utilities amount to hundreds of millions of dollars a year. In the 1986 rulemaking, DOE stated that "[l]ost sales resulting from [customer] terminations could reach at least \$300 million annually by 1988" (51 Fed. Reg. 3627 (1986)). Indeed, current customers, in response to the district court's order, have suggested that they would attempt to rescind their contracts entirely if

<sup>17</sup> For the period between 1985 and 1990, United States utilities are estimated to have contracted for some \$780 million worth of foreign uranium (Petitioners' C. A. Mot. for Stay Pending Appeal, App. 58, 73).

<sup>18</sup> The utilities' decision will depend on the comparison between (i) the termination charge and other expenses associated with breaking their enrichment contracts and (ii) the additional expense that would be involved in obtaining domestic uranium (see 51 Fed. Reg. 27136 (1986)). As DOE noted in its 1986 rulemaking, any incentive to buy domestic uranium will be concentrated in the early years of the contracts, when termination charges are highest (*ibid.*). DOE determined in that rulemaking that this incentive would not be sufficient to make the domestic uranium industry viable even in the short term (*ibid.*).

DOE is unable to enrich foreign uranium. Successful legal action would mean the loss of termination fees and possibly even the award of substantial damages against DOE for breach of its enrichment contracts. 51 Fed. Reg. 27136 n.10 (1986). The immediate threat to DOE, and hence to the treasury, thus runs well into the hundreds of millions of dollars and may amount to more than a billion. Moreover, because Section 2201(v) requires DOE to price its enrichment services so as to cover its costs, a substantial contraction of DOE's customer base would "force DOE to further curtail operations at its enrichment plants, increasing the unit cost of production, and thus drive more of DOE's customers overseas" (51 Fed. Reg. 27137 (1986)). This could produce a spiral of increasing costs and decreasing volume that eventually could eliminate DOE's commercial enrichment operations.<sup>19</sup>

c. The least readily quantified but perhaps the most important consequences of the district court's order would be felt by United States foreign policy, specifically trade and international nuclear policy. Most of the uranium imported into this country comes from Canada, our largest trading partner, and Australia, a close ally with which we have a trade surplus. Both Canada and Australia have presented Diplomatic Notes to the Department of State, setting forth in the strongest terms their objection to the injunction imposed by the district court (51 Fed. Reg. 27137 n.17 (1986) (quoting Notes)). The Notes suggest that the imposition of restrictions under Section 2201(v) would be inconsistent with the United States' obligations under

<sup>19</sup> The damage done by the district court's order, if it is allowed to stand, will be shared between the utilities and DOE (and other parties, including possibly the domestic uranium industry, see 51 Fed. Reg. 27136 (1986) (explaining that restrictions probably would lead consumers simply to obtain both uranium and enrichment abroad)) in a manner that cannot be predicted.



the General Agreement on Tariffs and Trade (GATT). 51 Fed. Reg. 27137 n.17 (1986).<sup>20</sup> No matter how the GATT issue might be resolved, the restrictions would have, in the words of the United States Trade Representative in a letter to the Secretary of Energy, " 'an adverse impact on our trade and other relationships with important trading partners without resolving the long-term problems of the industry' " (*id.* at 27137 (citation omitted)).

Trade is not the only aspect of foreign policy implicated by the decision below. Congress has determined that "the proliferation of nuclear explosive devices or of the direct capability to manufacture or otherwise acquire such devices poses a grave threat to the security interests of the United States" (Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, § 2, 92 Stat. 120). The decision below threatens American non-proliferation efforts in two ways. First, the damage to the competitive position of DOE's enrichment program discussed above threatens a loss of DOE's foreign enrichment customers. Nuclear fuel exported from the United States is subject to stringent conditions designed to ensure that it is used in a manner consistent with United States non-proliferation policy (§§ 304-307, 92 Stat. 131-138 (codified at 42 U.S.C. 2155-2158)). As the Department of State noted in commenting on the issue presented in this litigation, a shift away from DOE enrichment by foreign customers would replace those strict controls with "the controls of foreign

<sup>20</sup> The Diplomatic Notes presented to the Department of State by Canada and Australia in response to the district court's decision were attached to petitioners' June 1986 motion to the Tenth Circuit for a stay pending appeal. After the court of appeals delivered its decision in July 1987, Canada and Australia once again presented Notes reiterating their position. Diplomatic Note No. 194 from the Embassy of Canada (July 22, 1987); Diplomatic Note No. 237/87 from the Embassy of Australia (July 24, 1987).

enrichers, none of whom follows as stringent non-proliferation conditions as those required by U.S. law" (51 Fed. Reg. 27137 n.15 (1986) (declaration of Deputy Assistant Secretary of State for Nuclear Energy and Energy Technology Affairs James Devine)). Moreover, "[a] decline in DOE's position in the enrichment market would also create an increased commercial incentive for the spread of nuclear enrichment technology, which has potential nuclear weapons application" (*ibid.*).

More subtle but no less real is the impact of this decision on the general perception of the United States as a partner in nuclear cooperation. United States nuclear cooperation is accompanied by a number of very strict controls and limitations, designed to ensure that cooperating countries use American expertise in a manner consistent with United States non-proliferation policy (42 U.S.C. (& Supp. III) 2153). Nuclear cooperation, however, is available from sources other than the United States, some of which do not apply the same strict non-proliferation controls. Third countries will choose to obtain assistance and cooperation from the United States, and thereby accept the limits on their use of nuclear technology imposed by Congress, only if they perceive the United States to be an absolutely reliable partner.

The decision below threatens that perception. As Deputy Assistant Secretary of State Devine explained, "[u]nless the 'rules of the game' for nuclear cooperation are consistent and clear, there is a risk that such cooperation will be diminished and that the credibility and influence of the United States on nuclear non-proliferation matters in both bilateral and multilateral contexts will be undermined" (51 Fed. Reg. 27137 n.15 (1986)).

If the lower courts were correct in finding that Congress has chosen a policy that threatens international perceptions of American reliability, then of course that policy must be followed until Congress changes it, whatever the

consequences. We suggest, however, that a decision touching concerns of such delicacy and importance is best reviewed in this Court.

### CONCLUSION

The petition for a writ of certiorari should be granted.  
Respectfully submitted.

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OCTOBER 1987

### APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 85-2428 and 86-1942

WESTERN NUCLEAR, INC., ENERGY FUELS NUCLEAR, INC.,  
URANIUM RESOURCES, INC., PLAINTIFFS-APPELLEES

v.

F. CLARK HUFFMAN, AS CHIEF ENRICHMENT SERVICES  
BRANCH, ENRICHING OPERATIONS DIVISION, DEPARTMENT  
OF ENERGY; SHERRY E. PESKE, AS ACTING DIRECTOR OF  
MARKETING AND BUSINESS OPERATIONS (URANIUM  
ENRICHMENT) OF THE DEPARTMENT OF ENERGY; JOHN R.  
LOGENECKER, AS DEPUTY ASSISTANT SECRETARY OF  
URANIUM ENRICHMENT OF THE DEPARTMENT OF ENERGY;  
WILLIAM R. VOIGT, AS SPECIAL ASSISTANT FOR STRATEGIC  
POLICY ASSESSMENT TO THE ASSISTANT SECRETARY FOR  
NUCLEAR ENERGY OF THE DEPARTMENT OF ENERGY; JAMES  
W. VAUGHN, AS ASSISTANT SECRETARY FOR NUCLEAR  
ENERGY OF THE DEPARTMENT OF ENERGY; EARL GHELDE,  
AS SPECIAL ASSISTANT TO THE SECRETARY OF THE  
DEPARTMENT OF ENERGY; DANIEL BOGGS, AS UNDER  
SECRETARY OF THE DEPARTMENT OF ENERGY; DONALD P.  
HODEL, AS SECRETARY OF THE DEPARTMENT OF ENERGY;  
UNITED STATES DEPARTMENT OF ENERGY,

DEFENDANTS-APPELLANTS

CITY OF SAN ANTONIO, ACTING BY AND THROUGH THE CITY  
PUBLIC SERVICE BOARD OF SAN ANTONIO, DUKE POWER  
COMPANY; GULF STATES UTILITIES COMPANY; HOUSTON  
LIGHTING & POWER COMPANY; KANSAS CITY POWER &  
LIGHT COMPANY; KANSAS ELECTRIC COOPERATIVES, INC.;  
KANSAS GAS & ELECTRIC COMPANY; NEW YORK POWER  
AUTHORITY; OHIO EDISON COMPANY;

(1a)



PENNSYLVANIA POWER & LIGHT COMPANY; PHILADELPHIA  
ELECTRIC COMPANY; PUBLIC SERVICE COMPANY OF  
COLORADO; PUBLIC SERVICE ELECTRIC & GAS COMPANY;  
SOUTHERN CALIFORNIA EDISON COMPANY; SOUTHERN  
COMPANY SERVICES, INC.; THE CONNECTICUT LIGHT AND  
POWER COMPANY; THE TOLEDO EDISON COMPANY;  
VIRGINIA ELECTRIC AND POWER COMPANY; WESTERN  
MASSACHUSETTS ELECTRIC COMPANY; WISCONSIN  
ELECTRIC POWER COMPANY; UNION ELECTRIC COMPANY;  
BALTIMORE GAS & ELECTRIC COMPANY; ARKANSAS POWER  
& LIGHT COMPANY; MIDDLE SOUTH ENERGY, INC.; MIDDLE  
SOUTH SERVICES, INC.; AND LOUISIANA POWER & LIGHT,

AMICI CURIAE

NATIONAL TAXPAYERS UNION,

AMICUS CURIAE

STATES OF WYOMING, NEW MEXICO,  
COLORADO, UTAH AND NEVADA,

AMICI CURIAE

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**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

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[Filed July 20, 1987]

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Before McKAY, McWILLIAMS and BALDOCK, Circuit  
Judges.

McKAY, Circuit Judge.

Plaintiffs, three uranium mining and milling companies, filed a five-count complaint challenging various Department of Energy (DOE) policies. Shortly after filing the complaint, plaintiffs moved for summary judgment on count two, which challenged the DOE's use of the recently

adopted uranium enrichment services contract (UESC). The district court granted plaintiffs' motion, and the DOE appealed. While that appeal was pending, the district court also granted plaintiffs' summary judgment motion on count four, which alleged that the DOE was statutorily required to restrict enrichment of foreign uranium. The DOE appealed that decision, and we consolidated the two appeals.

This case raises important issues, the resolution of which will affect not only the parties involved in this suit but also all utilities that use nuclear power as well as the eventual consumers who purchase power from such utilities. A brief exposition of the nuclear industry and its history is helpful in understanding these important issues and their ramifications.

### **I. Background**

Private-entity involvement in the nuclear industry evolved gradually. In its infancy, the Government had a complete monopoly over the nuclear industry. It owned all uranium, all nuclear fuel, and all nuclear production and utilization facilities. Initially, the Atomic Energy Commission (AEC), the DOE's predecessor, controlled these operations. The AEC did permit private entities to mine uranium ore, but these entities could only sell to the Government. In 1954, Congress enacted legislation that permitted private ownership of nuclear reactors as well as private possession and use, but not ownership, of nuclear fuel. The AEC issued licenses permitting use of nuclear fuel and monitored entities that owned reactors and used nuclear fuel. However, private entities that mined uranium ore continued to have only one customer—the Federal Government. Finally, in 1964, Congress passed legislation permitting private ownership of nuclear fuel and allowing uranium mining and milling companies to sell to private entities.

Notwithstanding this shift to the private sector, the Government continued to play an important role in the nuclear fuel cycle. The natural uranium mined could not be used directly as nuclear fuel by the private entities that bought it. Natural uranium consists of less than one percent U-235, and nuclear fuel must contain approximately three percent U-235. Thus, to be used as nuclear fuel, uranium must have a higher concentration of U-235 than is found in nature. The process that produces this high concentration is called "enrichment", and, in 1964, the AEC was the only entity in the world with enrichment facilities. Consequently, private entities could not use natural uranium unless the AEC first enriched it to the level required for use as nuclear fuel. Congress recognized this and, when it privatized the ownership of nuclear fuel, permitted the AEC to contract with private entities for the provision of enrichment services. In order to protect the economic strength of the domestic uranium industry, Congress also restricted enrichment of foreign uranium when the resulting nuclear fuel was designated for use in domestic facilities. Initially, the AEC was not permitted to enrich any foreign uranium for domestic use. As demand for nuclear fuel increased, however, the restrictions were phased out, and the AEC, later the DOE, eventually provided enrichment services for both domestic and foreign uranium.

Increases in demand for nuclear fuel also encouraged foreign entities to build enrichment facilities. This increased the competition for enrichment and permitted some of the DOE's domestic and foreign customers to obtain enrichment services outside the United States. As long as demand for nuclear fuel continued to increase, neither the DOE nor the domestic mining and milling companies were overly concerned with foreign competition. Rather, they were operating at capacity and were not threatened by the foreign competition.

The boom, however, was followed by a bust. Private entities that expected uranium demand to exceed supply had entered longterm contracts for uranium and for enrichment services. The quantities were based on forecasts of nuclear fuel needs in all present and future facilities. Unfortunately, many nuclear facilities were not completed on schedule, or were never completed, and private entities were left with huge stockpiles of nuclear fuel and no place to use it. Some sold nuclear fuel to other entities and, as their contracts expired, stopped purchasing both uranium and nuclear fuel. Others, however, began to purchase higher quality uranium at lower costs from now fully operational foreign mines.

The DOE also faced increased foreign competition in the enrichment field. It responded by offering enrichment services on new and different terms. Restrictions on enrichment of foreign uranium had long since been discontinued, but the DOE now offered a variable-tails option in order to attract customers away from the foreign competition. Tails are the depleted uranium left over after the enrichment process is completed. A DOE customer could select a low tails assay—a low concentration of U-235 in the tails—and decrease the uranium in the enrichment process. In other words, by increasing the enrichment used on a particular quantity of uranium, the DOE was able to increase the amount of enriched uranium produced from a given quantity of natural uranium. By offering the variable-tails option, the DOE permitted its customers to use more uranium and less enrichment services or less uranium and more enrichment services.

These DOE policies with respect to enriching foreign uranium and offering a variable-tails option increased the perceived economic threat to domestic uranium mining and milling companies. They faced increased use of foreign uranium as well as decreased use of uranium in general because of the new variable-tails option. Plaintiffs



and other mining and milling companies responded by requesting that the DOE implement restrictions on enrichment of foreign uranium as required by 42 U.S.C. § 2201 (v) (1982), which provides that the DOE, "to the extent necessary to assure the maintenance of a viable domestic uranium industry shall not offer [enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States." The DOE initially refused, claiming that the domestic mining and milling industry was viable, and, thus, section 2201 (v) did not require any restrictions. In 1984 and again in 1985, however, the DOE expressly found that the domestic uranium industry was not viable. Even so, it still refused to impose restrictions, now claiming that even if restrictions were imposed the domestic industry would not become viable.

Meanwhile, the DOE was grappling with economic problems of its own. It had become the high cost provider of enrichment services and had lost many of its customers to foreign enrichers. In an attempt to recapture part of the market, the DOE adopted the UESC. This standard form contract provided lower prices, encouraged use of foreign source uranium, and permitted a variable-tails option. Prior to using the UESC, the DOE did not implement any rulemaking procedures pursuant to the Administrative Procedure Act or submit the contract to Congress.

Plaintiffs, already threatened by the precarious economic state of the uranium industry, felt further threatened by the UESC and thereafter filed their complaint in this matter.

## II. Challenge to Uranium Enrichment Services Contract

In count two of their complaint, plaintiffs challenged the DOE's adoption of the UESC. The claim was based on both substantive and procedural grounds, but the district court reached only the latter in concluding that the

adoption of the UESC was procedurally defective. It stated:

I conclude that the new [UESC] amounts to a change in the "criteria" under which enrichment services are to be performed. Because the contract was not submitted to Congress, it is null and void.

Accordingly, it is ordered that the plaintiffs motion for partial summary judgment as to Count II is granted.

Amended Order, record, vol. 2, doc. 15, at 4.

The DOE now challenges the decision on count two, claiming that: (1) plaintiffs' claim is moot; (2) plaintiffs lack standing; and (3) the district court was erroneous on the merits.

### A. Mootness

Mootness goes to the jurisdiction of a federal court. To satisfy the "case or controversy" limitation of Article III, "[t]he actual controversy between the parties 'must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated.'" *Wiley*, 612 F.2d at 475 (quoting *Roe v. Wade*, 410 U.S. 113, 125 (1973)). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 496 (1969). "The burden of demonstrating mootness 'is a heavy one,'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)), and can be satisfied only if two conditions are shown:

(1) it can be said with assurance that "there is no reasonable expectation . . ." that the alleged violation will recur, see [*W.T. Grant*, 345 U.S.] at 633; see also *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972), and

(2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Indiana Employment Security Div. v. Burney* 409 U.S. 540 (1973).

*Davis*, 440 U.S. at 631.

We need only reach the second condition. The DOE asserts that plaintiffs' sole challenge to the UESC was that its implementation was procedurally defective. Indeed, the grounds for the district court's granting of plaintiffs' summary judgment motion was that "the [UESC] amounts to a change in the 'criteria' under which enrichment services are to be performed [and it] was not submitted to Congress." *Western Nuclear, Inc. v. Huffman*, No. 84-C-2315, slip op. at 4 (D. Colo. Sept. 19, 1985). Since the district court's decision in this case, the DOE has submitted the UESC to rulemaking procedures. DOE, therefore, argues that plaintiffs' appeal is moot.

We need not determine whether subsequent DOE and congressional activity cured any alleged procedural defects in this case and thus mooted plaintiffs' claim. Their challenge was not based only on procedural grounds; it included substantive grounds as well, and plaintiffs' substantive challenge to the UESC remains viable. The DOE admits that the criteria adopted through the subsequent rulemaking procedures are the same as those embodied in the UESC. Consequently, if substantive deficiencies existed before the DOE rulemaking process, they still exist.

Because we conclude that the DOE has not shown that plaintiffs' claim has been eradicated by subsequent rulemaking, we need not reach the issue of whether the violations can recur. The DOE has failed to show that plaintiffs' claim is moot.

## B. Standing

Even though the DOE did not challenge plaintiffs' standing in the district court, we must address that issue before we can reach the merits of this case.

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. See, e.g., *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 173-180, 2 L.Ed. 60 (1803). For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S. Ct. 162, 165, 79 L.Ed. 338 (1934).

*Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326, 1331 (1986). One jurisdictional requirement is that of standing.

Standing focuses on whether a particular plaintiff has the right to pursue a cause of action. "[L]ike mootness and ripeness, [it] 'has its constitutional origins in the "case or controversy" limitation of Article III which insures that courts exercise their power only in cases where true adversary context allows informed judicial resolution.'" *Citizens Concerned for Separation of Church & State v. City of Denver*, 628 F.2d 1289, 1294 (10th Cir. 1980) (quoting *Wiley v. National Collegiate Athletic Ass'n*, 612 F.2d 473, 475 (10th Cir. 1979), cert. denied, 446 U.S. 943 (1980)), cert. denied, 452 U.S. 963 (1981). While the courts have not always been clear as to which standing requirements are based on the Constitution and which are based on prudential concerns of the courts, they have established that

at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he



personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

*Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Consequently, to establish standing plaintiffs must show<sup>1</sup> that the DOE's adoption of the UESC has injured them and that the court can redress that injury by invalidating the UESC.

Plaintiffs claim they have met this burden because the DOE, by filing its cross-motion for summary judgment without challenging standing, implicitly acknowledged plaintiffs' standing. However, "[p]arties may not by stipulation invoke judicial power of the United States in litigation which does not present an actual case or controversy, and jurisdictional questions are of primary consideration and can be raised at any time by courts on their own motion." *City of Denver*, 628 F.2d at 1296-97 (citations omitted). Thus, the DOE cannot consent to plaintiffs' standing. In fact, even if no party challenged standing, we are required to raise the issue.

At the summary judgment stage, plaintiffs are entitled to prevail only if the record shows "that there is no genuine issue as to any material fact and that [plaintiffs are] entitled to a judgment as a matter of law." Fed. R. Civ. P.

<sup>1</sup> Plaintiffs bear the burden of proving standing. This "burden is not insurmountable; they need only demonstrate a 'substantial likelihood' that the causal link exists," *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 427 (1st Cir. 1983), and "that the relief requested will redress the injury." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978).

56(c). When the standing issue is not raised in the district court, review on appeal may reveal factual disputes. See, e.g., *Steele v. National Firearms Act Branch*, 755 F.2d 1410, 1414 (11th Cir. 1985).

The factual dispute with respect to standing in this case revolves around the causation element of standing. The parties agree that plaintiffs have been harmed by the decline in demand for domestic uranium; however, they disagree on whether the adoption of the UESC has any nexus to that decline. An affidavit filed by plaintiffs in support of their motion for summary judgment states in relevant part:

DOE policies with respect to the provision of enrichment services can have and do have a significant impact on demand for uranium and, consequently, the viability of the domestic uranium industry. For example, independent consultants (e.g., Nuexco and Nuclear Resources International) indicate that DOE's new [UESC] may diminish demand for uranium by as much as 100,000,000 pounds or more over the next five to ten years. This approximates or exceeds expected production for the period.

Plaintiff's Memorandum in Support of Motion for Summary Judgment on Count II, record, vol. 1, doc. 3, Exhibit B (affidavit of Larry A. Boggs), at ¶ 2. To support the causal link, and thus standing, between the adoption of the UESC and the decrease in demand for domestic uranium, plaintiffs argues on appeal that the UESC: (1) fails to restrict enrichment of foreign uranium; (2) permits enrichment customers to select a variable-tail assay that increases the use of enrichment services and decreases the use of uranium; and (3) contains pricing provisions that decrease demand for domestic uranium. If the UESC is invalidated, plaintiffs argue, these policies will be reversed and the demand for domestic uranium will consequently increase. However, since standing was not challenged in

the district court, the record fails to explain how the UESC would decrease demand for domestic uranium and thereby cause plaintiffs harm. Plaintiffs' claim that we may look beyond the record to the circumstances surrounding the case is inaccurate. The Supreme Court has specifically stated that "[t]he existence of a justiciable 'case' or 'controversy' under Art. III must affirmatively appear in the record." *Bender*, 106 S. Ct. at 1334.

Notwithstanding DOE's failure to challenge plaintiffs' standing at the trial level, it did specifically refute plaintiffs' claim that the UESC harmed them because it decreased demand for domestic uranium. The DOE claimed in that forum that the UESC did not amend existing DOE policy and, thus, could not change the demand for domestic uranium. On this appeal, the DOE renews this contention by arguing that even though the demand for domestic uranium has declined and will likely continue to decline, the adoption of the UESC did not affect that demand and, consequently, plaintiffs do not have standing to challenge the UESC. It maintains that the policies behind the UESC existed prior to its adoption and would continue to exist even if the UESC were declared null and void.

Plaintiffs conceded in their complaint that the DOE did not restrict enrichment of foreign uranium and allowed customers to select a variable-tail assay before the adoption of the UESC. *See* Complaint, record, vol. 1, doc. 1 at 9, 17, 18. An injury that "occurred before, existed at the time of, and continued unchanged after the challenged" action cannot support a standing claim. *California Ass'n of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 827 (D.C. Cir. 1985). Policies ostensibly harming plaintiffs that existed prior to the adoption of the UESC are insufficient to vest plaintiffs with standing to challenge the legality of the UESC. However, the record in this case is unclear as to whether adoption of the UESC did in fact

effect a change in DOE policies regarding enrichment of foreign uranium and availability of variable-tail assays. The UESC may have implemented more lenient policies that exacerbated the economic harm already experienced by plaintiffs. This unresolved factual dispute surrounding the causation component of the standing inquiry may not be resolved on appeal.

Plaintiffs argue alternatively that UESC pricing of DOE enrichment services may decrease demand for domestic uranium, thus harming them and supporting standing to challenge the UESC. Plaintiffs cannot argue that lower enrichment prices decrease domestic uranium sales. If the DOE has higher prices, DOE customers are encouraged to seek enrichment services from DOE's foreign competitors. Both parties agree that entities who use foreign enrichers also tend to purchase foreign uranium. Consequently, a decrease in DOE enrichment prices should encourage domestic enrichment and, concomitantly, domestic uranium purchases. On the other hand, plaintiffs may be arguing that new pricing techniques favor foreign uranium over domestic uranium and, thus, decrease demand for domestic uranium. We find this doubtful because section 2201(v) specifically mandates that pricing of enrichment services be nondiscriminatory. Nonetheless, plaintiffs should be permitted to present whatever factual support they have for this argument on remand.

Because of the unresolved factual dispute surrounding the causation component of the standing inquiry, we cannot conclude that plaintiffs have satisfied their burden on appeal of establishing standing. However, because the DOE failed to contest standing in the district court, plaintiffs should be allowed to present evidence supporting their standing allegations. "Factual issues concerning the existence of the standing requirements in a particular case are to be resolved in the same manner as any other con-



troverted fact." *Steele*, 755 F.2d at 1414. Thus, we remand for resolution of the factual dispute which will be determinative of plaintiffs' standing to challenge the UESC.

### C. Merits

Because the issue of standing on this claim remains unresolved, any opinion on the merits of this case would be an advisory opinion. "[F]ederal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Pub. Workers of Am. v. Mitchell*, 300 U.S. 75, 89 (1947). Thus, we cannot reach the merits of plaintiffs' challenge to the UESC.

### III. Restrictions on Enrichment of Foreign Uranium

Count four of plaintiffs' complaint alleges that the DOE violated 42 U.S.C. § 2201(v) (1982) when it refused to restrict enrichment of foreign uranium despite a determination that the domestic uranium industry was not viable. The DOE argues that restrictions are only required if they would make the domestic uranium industry viable and that restrictions at this time would not result in a viable industry. The district court interpreted section 2201(v) to require the DOE to restrict enrichment of foreign uranium whenever the domestic industry is not viable—whether or not such restriction would result in successful resuscitation of the uranium industry. The DOE appealed and moved to stay enforcement of the district court order until the appeal was finally decided. We granted the motion to stay and expedited the appeal.

This case is one of statutory interpretation. The parties agree that the domestic uranium industry is not viable and agree that the DOE's actions are controlled by section 2201(v). However, they disagree on the meaning of that statute. Even under current law, which requires great

deference to agency interpretation of statutes, the Supreme Court has recognized that

[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (citations omitted). Under this authority, the district court decided that, unless the DOE determines that something other than restrictions will assure the viability of the domestic uranium industry, section 2201(v) requires restrictions on enrichment of foreign uranium whenever the domestic industry is not viable. Since this is a statutory interpretation question, we review that decision *de novo*. See *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986); *City of Edmonds v. United States Dep't of Labor*, 749 F.2d 1419, 1421 n.2 (9th Cir. 1984).

The courts have long recognized that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); see also *Rubin v. United States*, 449 U.S. 424, 429 (1981). "When we find the terms of a statute unambiguous, judicial inquiry is complete, except 'in "rare and exceptional circumstances. " ' " *Id.* at 430 (quoting *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930))). Even when an agency interpretation is normally entitled to deference, "(i)f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A.*, 467 U.S. at 842-43. Thus, we look first to the language of the statute, and if it is

unambiguous, we look to the legislative history only to determine if exceptional circumstances dictate an interpretation contrary to the language of the statute.

As noted, the relevant portion of the statute provides that "*to the extent necessary to assure the maintenance of a viable domestic uranium industry, [the DOE] shall not offer*" enrichment services for foreign-source uranium designated for use in the United States. 42 U.S.C. § 2201(v) (emphasis added). The DOE relies on *Young v. Community Nutrition Institute*, 106 S. Ct. 2360 (1986), in arguing that the phrase "to the extent necessary" gives it discretion to determine whether to restrict enrichment of foreign uranium. The Supreme Court in *Young* was interpreting 21 U.S.C. § 346 (1982), which states:

Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2) (A) of section 342 (a) of this title; but when such substance is so required or cannot be avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon *to such extent as he finds necessary for the protection of public health*, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2) (A) of section 342(a) of this title.

(Emphasis added.) The FDA's longstanding interpretation was that the phrase "to such extent as he finds necessary for the protection of public health" modified the word "shall." Thus, the FDA was of the opinion that it was to determine when regulation was necessary to protect public health. Having determined that regulating aflatoxin (a poisonous substance present in some foods) was not necessary to protect the public health, the FDA did not promulgate regulations. The Supreme Court decided that

it was unclear whether the critical phrase modified "shall" or "the quantity therein or thereon." As a result, the Supreme Court concluded that the courts should adopt the agency interpretation of the statute as a reasonable one. The critical point in the analysis was that the "FDA [had] advanced an interpretation of an ambiguous statutory provision." *Young*, 106 S. Ct. 2365. Once that point was reached, the Court was required to defer to the reasonable interpretation of the agency.

The case before us presents a different situation. Congress, in enacting section 2201(v), used unambiguous language. It stated "the [DOE] . . . shall not offer" the enrichment of foreign uranium. The use of "shall" is usually mandatory language and will require action unless a convincing argument to the contrary can be made. See *City of Edmonds*, 749 F.2d at 1421; *American Fed'n of Gov't Employees v. Federal Labor Relations Auth.*, 739 F.2d 87, 89 (2d Cir. 1984); *Manatee County v. Train*, 583 F.2d 179, 182 (5th Cir. 1978); *Association of Am. R.R. v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977). Thus, section 2201(v) requires that the DOE not offer enrichment of foreign uranium.

This requirement is, of course, subject to the modifying phrase "to the extent necessary to assure the maintenance of a viable domestic uranium industry." That phrase, however, is also unambiguous. It informs the DOE of the *amount* of restriction required; it does not provide a scenario in which the DOE is excused from restricting foreign enrichment notwithstanding a nonviable domestic industry. It instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed and must become increasingly aggressive, to the point of 100% restriction, until the domestic industry is rejuvenated and becomes viable. If a less-than-100% restriction can assure viability, only that lesser level of restriction is required. The statute does not



provide that increasingly stiffer restrictions are required only to the point that DOE determines that such restrictions will not resuscitate the industry. Under its interpretation of the statute, the DOE has no discretion until that time, but once such a determination is made, it may lift *all* restrictions—at the precise point in time when the domestic industry is at its lowest ebb.

Furthermore, the nature of the modifying phrase here differs from *Young*. In *Young*, the FDA specifically argued that regulations were not required to protect the public health; rather, tolerance levels established by the FDA accomplished that goal. The FDA credibly argued that it could serve the statutory purpose—the protection of the public health—without publishing regulations for aflatoxin. In this case, the DOE cannot accomplish its statutory purpose—the maintenance of a viable domestic uranium industry—without imposing restrictions on enrichment of foreign uranium. Rather, the DOE proposes to abandon the statutory goal. The DOE does not argue that the domestic industry is viable without restrictions; it claims that it has discretion to determine whether to implement restrictions when restrictions will not assure the viability of the domestic industry. The DOE's interpretation strains the plain meaning of section 2201(v). The unambiguous language of the statute requires the DOE to refuse enrichment of foreign uranium "to the extent necessary to assure" a viable domestic industry. The DOE may determine how much restriction is required to ensure viability, but it cannot decide not to impose restrictions when the industry is not viable. It must continue to increase restrictions until the domestic industry becomes viable. The DOE's argument that this policy is not wise in the present uranium market should be made to Congress and not to the courts. We can only apply the statute as Congress passed it.

Finally, this is not a "rare and exceptional" case in which the language of the statute must give way to clear congressional intent. In hearings prior to the enactment of section 2201(v), consistent concern was expressed over the effects of imports on the domestic uranium industry. See, e.g., *Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 1st Sess. 114-15 (1963) (Statement of Richard D. Bokum II, President, United Nuclear Corp.), *id.* at 145 (statement of Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO); *Private Ownership of Special Nuclear Materials, 1964: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong. 2d Sess. 154 (1964) (statement of Dean A. McGee, President, Kerr-McGee Oil Industries). In its report to Congress, the Joint Committee first recognized the importance of a viable domestic uranium industry:

The maintenance of a viable domestic uranium mining and milling industry is an essential part of a sound nuclear industry and is also vital to the long-range defense and security interests of the United States. The bill accompanying this report, by providing for uranium enrichment services, is a desirable step in this direction.

8. Rep. No. 1325, 88th Cong., 2d Sess. —, *reprinted in* 1964 U.S. Code Cong. & Admin. News 3105, 3115. The committee then explained the basis for requiring restrictions.

[I]mportation could have a serious impact on the uranium mining and milling industry, particularly during a period of limited demand for its product. Accordingly, the flexible restrictions contained in the committee bill will allow the [DOE] to review periodically the condition of the domestic and world



uranium markets and to offer enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium mining and milling industry.

. . . .

. . . [T]he committee . . . has concluded that it would be reasonable to place restrictions upon the performance of services by the [DOE] where the enrichment of foreign material would have an adverse effect on the domestic uranium industry. It is the committee's view that the measures taken in this bill to assure the viability of the domestic uranium industry are in the national interest since this industry is closely related to our vital defense and security interests.

*Id.* at —, reprinted in, 1964 U.S. Code Cong. & Admin. News at 3120-21. At no point in the legislative history is there any indication that Congress would permit the DOE to abandon attempts to maintain a healthy domestic industry. On the contrary, Congress considered a viable domestic industry to be vitally important to United States defense and security interests and did not want the United States to become dependent on foreign sources of uranium. We conclude that the legislative history supports our determination that if the domestic uranium industry is not viable, the DOE must restrict enrichment of foreign uranium. Thus, we affirm the district court's decision granting plaintiffs' summary judgment motion on count four.

### III. Conclusion

Plaintiffs' challenge to the UESC is remanded to the district court. The record does not clearly demonstrate that plaintiffs have standing. However, the DOE did not challenge standing in the district court, and plaintiffs

should be given an opportunity to prove their standing allegations.

Plaintiffs' claim that section 2201(v) unambiguously requires the DOE to implement restrictions on enrichment of foreign uranium when the domestic uranium industry is not viable is correct. The DOE has not implemented such restrictions and, thus, the district court's decision granting plaintiff injunctive relief was appropriate and should be affirmed.

The case is affirmed in part and remanded in part, with instructions to proceed in a manner consistent with this opinion. The stay of the district court's injunction heretofore entered is dissolved.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

No. 84-C-2315

WESTERN NUCLEAR, INC., ET AL., PLAINTIFFS

v.

F. CLARK HUFFMAN, ET AL., DEFENDANTS

[Filed June 20, 1986]

## ORDER

CARRIGAN, J.

Oral argument was heard on June 5, 1986, on all pending motions in this case. The motions are directed to counts I, III, IV and V of the plaintiffs' complaint. Having heard the arguments of counsel with respect to the pending motions, having read the extensive briefs, and being fully advised, I hereby enter the following orders:

1. Plaintiffs' Motion for Summary Judgment with respect to Count I is granted and the defendants' Cross-motion for Summary Judgment with respect to Count I is denied. Defendants' request for a stay with respect to Count I is denied.

In light of the record, including affidavits submitted by the plaintiffs and *amici*, and including the information contained as part of the Secretary of Energy's determination in September 1985 that the domestic uranium industry was not viable, and in light of the Department of Energy's continuing refusal to recognize its obligations under 42

U.S.C. § 2201(v), I find that there is an immediate necessity for injunctive relief and therefore order as follows:

Given the Department of Energy's need to plan its implementation of the mandate of § 161(v) of the Atomic Energy Act, 42 U.S.C. § 2201(v), and pending the completion of the rule-making ordered herein: (a) the Department shall restrict its enrichment of source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States to twenty-five percent of such materials enriched over the time period June 6, 1986, to December 31, 1986; (b) as of January 1, 1987, and continuing until the viability of the domestic uranium industry is assured, the Department shall not offer or provide any enrichment services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.

The Department shall commence administrative rule-making proceedings to establish criteria for providing enrichment services that shall comply with the mandate of 42 U.S.C. § 2201(v) to assure the maintenance of a viable domestic uranium industry. These criteria shall include the extent to which enrichment services may be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. If the Department believes that criteria less restrictive than those imposed by this order would assure the maintenance of a viable domestic uranium industry, then the Department shall clearly articulate its reasons for such a position.

The court retains jurisdiction of this matter to assure compliance with this order.

2. With respect to the issues raised by Count III of the complaint, and the motions pending concerning Count III

of the complaint, the defendants' Motion for Stay is granted for ninety days.

3. With respect to Count IV of the complaint, the defendants' Motion to Dismiss is denied and the defendants' Motion for Stay is denied. The defendants' Motion for Summary Judgment with respect to Count IV is granted.

4. Upon motion of the plaintiffs, there being no objection from the defendants, the plaintiffs are granted leave to withdraw Count V of their complaint without prejudice.

Dated at Denver, Colorado, June 20, 1986.

BY THE COURT:

/s/ JIM R. CARRIGAN, JUDGE

Jim R. Carrigan, Judge  
United States District Court

# APPENDIX C

[Excerpts from Transcript of June 5, 1986 Motions Hearing, United States District Court, District of Colorado].

THE COURT: Those are all—those are just policy arguments. I'm not a policy-making board or I'm not in Congress, I'm simply trying to figure out what the law says so I can follow it, that's what I'm sworn to do. To me it says that the agency, the Department of Energy, shall not offer such services for source or special nuclear materials of foreign origin—period. In effect, I don't see how there is any discretion in that language.

MS. CLIFFORD: Your Honor—

THE COURT: How could it be any clearer than saying "shall not offer?"

MS. CLIFFORD: Because, Your Honor, of the clause there which provides that there must be a determination that it will assure the maintenance of a viable domestic industry. Your Honor, we submit that the preliminary finding of the Department of Energy is that it will not.

\* \* \* \* \*

[The Court] In any event, I conclude that the Atomic Energy Act does not preclude judicial review of that agency's actions or the present Department of Energy's actions. It appears to me that even if there were some discretion given to the agency here to determine whether or what measures ought to be taken, clearly this statute does not leave the discretion not to take any measures at all to assure the provision of a viable domestic industry. It seems to me clear from the Congressional history that Congress intended that—that its language operate as a mandate, and if it didn't so intend then it ought to be swiftly amended so that courts can understand that it didn't intend what its plain language says.



No. 87-645

Supreme Court, U.S.  
FILED

NOV 20 1987

JOSEPH T. SPANIOLO, JR.,  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

F. CLARK HUFFMAN, *et al.*,  
*Petitioners,*

v.

WESTERN NUCLEAR, INC., *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit

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### QUESTION PRESENTED

Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v), provides that the Department of Energy ("DOE"), "to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer [enrichment] services" for foreign-source uranium destined for domestic use.

The question presented is whether Section 161(v) requires DOE to restrict enrichment of foreign-source uranium when the domestic uranium industry is not viable.

**PARTIES TO THE PROCEEDING  
AND STATEMENT PURSUANT TO  
SUP. CT. RULE 28.1**

The petitioners are the United States Department of Energy ("DOE") and the following officers or employees of DOE who were sued in their official capacities: John S. Herrington, Secretary of Energy, F. Clark Huffman, Sherry E. Peske, Philip G. Sewell, James W. Vaughn, and Joseph F. Salgado.

Respondents are Western Nuclear, Inc., Energy Fuels Nuclear, Inc., and Uranium Resources, Inc. Western Nuclear, Inc. is a wholly-owned subsidiary of Phelps Dodge Corporation. Energy Fuels Nuclear, Inc. is wholly owned by JRA Enterprises, Ltd., a Colorado limited partnership. The sole general partner of JRA Enterprises, Ltd. is John R. Adams.

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## OCTOBER TERM, 1987

F. CLARK HUFFMAN, *et al.*,  
v. *Petitioners*,  
WESTERN NUCLEAR, INC., *et al.*,  
*Respondents*.

### RESPONDENTS' BRIEF IN OPPOSITION

This case presents a straightforward question of statutory interpretation. Much of the factual recitation in the petition, however, has no bearing on that question. Indeed, the petition as a whole is remarkable for its avoidance of any meaningful discussion of the *purpose* of the statutory provision at issue.

Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v), authorizes the Atomic Energy Com-

mission ("AEC") to contract with operators of nuclear reactors for the enrichment of uranium fuel.<sup>1</sup> That authorization is subject to a number of limitations, including the following proviso:

That the Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such [enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.

Congress' purpose in enacting the statutory restriction on enrichment of foreign-source uranium was "to assure the viability of the domestic uranium industry" in the face of "substantial imports of foreign uranium for enrichment and sale on the domestic market." Congress found the health of the domestic uranium industry to be "closely related to our vital defense and security interests." S. Rep. No. 1325, 88th Cong., 2d Sess. 16, 17 (1964).

Consistent with the statutory mandate, the AEC in 1966 adopted "criteria" for the enrichment program that barred *any* enrichment of foreign source uranium for domestic end use. 31 Fed. Reg. 16,479 (1966). For more than a decade, the enrichment of foreign-source uranium was prohibited entirely.

In 1968, the AEC advised Congress that any future relaxation of the enrichment restriction would be "consistent with reasonable assurance of the viability of the domestic uranium industry."<sup>2</sup> In 1972, the AEC Chair-

<sup>1</sup> The DOE has succeeded to the responsibilities of the AEC under Section 161(v). The AEC's licensing and related regulatory functions have been transferred to the Nuclear Regulatory Commission ("NRC"). See Pet. 5 n.2.

<sup>2</sup> Atomic Energy Commission, 1968 Statement on Uranium Supply Policies and Related Activities, reprinted in *Status of the*

man testified that modification of the existing ban on enrichment of foreign uranium would be undertaken only if it was consistent with the maintenance of a viable domestic uranium industry. The Chairman explained that the restriction might be

adjusted so as to take an unbearable load off American suppliers, but would still permit the growth of American industry . . . . If there are American uranium reserves to be exploited, the intention would be that those reserves would be exploited.<sup>3</sup>

In 1974, the AEC concluded that the demand for uranium was likely to expand dramatically, and that restrictions on enrichment of foreign-source uranium could be phased out gradually without adversely affecting the viability of the domestic uranium industry. The agency proposed to begin removing the restrictions in 1977 and to lift all restrictions by the end of 1983. 39 Fed. Reg. 38,016 (1974). The AEC Chairman assured Congress that restrictions would be reimposed if the viability of the domestic uranium industry were threatened:

Should there be any indication that the proposed schedule [of eliminating restrictions] is endangering domestic industry viability, U.S. self-sufficiency, or our national security, the Commission will reimpose restrictions or take such other steps as might be appropriate.<sup>4</sup>

*Domestic Uranium Mining and Milling Industry, The Effects of Imports: Hearings Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources, 97th Cong., 1st Sess. 415 (1981).*

<sup>3</sup> AEC Authorizing Legislation, Fiscal Year 1973: *Hearings Before the Joint Comm. on Atomic Energy, 92d Cong., 2d Sess. 2,328 (1972)* (testimony of James R. Schlesinger).

<sup>4</sup> *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use: Hearings Before the Joint Comm. on Atomic Energy, 93rd Cong., 2d Sess. 6 (1974)* (testimony of Wm. A. Anders). Another AEC witness emphasized that, in the event of a massive increase in low-priced imports of uranium,



Domestic production of uranium increased significantly in response to the AEC's predictions of greatly increasing demand. Increased demand for nuclear fuel and the AEC's decision to cease taking new enrichment orders in 1974 also encouraged foreign entities to construct enrichment facilities, thus ending this country's monopoly over the provision of enrichment services for commercial nuclear reactors.<sup>5</sup>

In fact, the increase in uranium demand was not nearly as dramatic as the AEC had predicted. Orders for new nuclear reactors in the United States declined drastically in the late 1970s and disappeared entirely after 1978. This created a glut in the uranium market and a corresponding decline in the price of uranium ore. Pet. App. 5a.<sup>6</sup>

As early as 1981, representatives of the domestic uranium industry requested DOE to reimpose restrictions on the enrichment of foreign uranium, but DOE has consistently refused to do so. The result has been economic disaster for the industry. A recent report issued by the Senate Committee on Energy and Natural Resources summarizes the situation as follows:

The Energy Information Administration (EIA) of the Department of Energy found, in its 1985 report, that annual domestic uranium production was

"[w]e will still be living under the restriction in the act that the viability of the domestic industry is the criterion"; that "we would be obligated under the act" to reimpose restrictions because of "the viability issue"; and that "the matter of the viability of the domestic industry is a legal requirement on the Commission under the Act." *Id.* at 129, 134-35 (testimony of George F. Quinn).

<sup>5</sup> S. Rep. No. 100-214, 100th Cong., 1st Sess. 14-15 (1987).

<sup>6</sup> Nonetheless, according to recent DOE estimates, by the year 2000 domestic demand for uranium is expected to increase by 30 percent and world-wide demand is expected to double. See Energy Information Adm., DOE, *Domestic Uranium Mining and Milling Industry: 1984 Viability Assessment* 28 (1985).

at its lowest level since the mid-1950's, while exploration and development drilling had dipped to their lowest points since the mid-1960's. The EIA also found employment down to 2,400 person-years in 1985 from 13,700 person-years in 1981. According to testimony given by the EIA before the Senate Committee on Energy and Natural Resources on March 9, 1987, the number of operating mines dropped to 3 in 1986, compared to 362 in 1979. Net earnings for the industry in 1984 and 1985 were negative.<sup>7</sup>

Meanwhile, as DOE has acknowledged, the percentage of foreign-source uranium enriched by DOE for domestic end use climbed steadily from 10 percent in 1981 to approximately 50 percent in 1986,<sup>8</sup> and it continues to increase significantly.

#### B. The Proceedings Below and Concurrent Administrative and Legislative Developments

Respondents, uranium mining and milling companies, filed this lawsuit in December 1984, seeking to compel DOE to take action under Section 161(v) to restrict the enrichment of foreign-source uranium so as to assure the viability of the domestic uranium industry. DOE, despite overwhelming evidence to the contrary, maintained at that time that the domestic industry was still "viable," and it refused to impose any restrictions pursuant to the statute.<sup>9</sup>

In September 1985, however, while the action was still pending in the district court, DOE issued a formal finding that the industry had not been viable for calendar year 1984. Pet. App. 6a.<sup>10</sup> DOE subsequently found that

<sup>7</sup> S. Rep. No. 100-214, *supra*, at 9.

<sup>8</sup> Peske Affidavit (June 23, 1986), Appendix to Appellants' Motion for Stay in Court of Appeals, at 87-88.

<sup>9</sup> See Energy Information Adm., DOE, *Domestic Uranium Mining and Milling Industry: 1983 Viability Assessment* (1984).

<sup>10</sup> DOE made its determination pursuant to 42 U.S.C. § 2210b, which requires DOE to make an annual assessment of the indus-

the industry was not viable in 1985. *Id.* The parties agree that the industry continues to be non-viable.

Following DOE's September 1985 determination of non-viability, the parties filed cross motions for summary judgment. Respondents contended that, given the concededly non-viable state of the domestic uranium industry, Section 161(v) required DOE to take action to restrict enrichment of foreign uranium, to the extent necessary to assure the viability of the industry. Petitioners contended that respondents had no right to complain of DOE's inaction under Section 161(v) because DOE had been given broad and essentially unreviewable discretion to decide whether or not to impose enrichment restrictions.<sup>11</sup>

The district court granted respondents' motion for summary judgment. Pet. App. 22a-24a. On June 20, 1986, it entered an order requiring DOE (1) to restrict enrichment of foreign-source uranium to no more than 25 percent of its total enrichment activity for the remainder of the year; (2) to cease enrichment of foreign-source uranium entirely commencing in 1987 (and thus to return to the agency's practice from 1966 to 1977); and (3) to commence a rulemaking to determine whether "criteria less restrictive than those imposed by this order would assure the maintenance of a viable domestic uranium industry." *Id.* at 23a. DOE has not yet commenced such a rulemaking.

Meanwhile, in September 1985, the district court had entered summary judgment for respondents on a separate

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try's viability. Before Congress enacted Section 2210b in 1982, DOE had failed to make an assessment of the viability of the industry since 1973. One of the purposes of Section 2210b was "to compel the implementation of Section 161(v)." 128 Cong. Rec. H8303 (daily ed. Dec. 2, 1982) (remarks of Rep. Lujan).

<sup>11</sup> Memorandum in Support of Defendants' Motion for Judgment on the Pleadings and Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 17-25 (Sept. 30, 1985).

count of their complaint that challenged the validity of DOE's standard form enrichment contract on the ground that DOE had not satisfied certain procedural requirements attendant to modification of that contract.<sup>12</sup> Thereafter, in January 1986, DOE sought to cure the procedural infirmities identified by the district court by commencing a rulemaking proceeding. In its notice of proposed rulemaking, DOE stated its intent not to impose any restrictions on the enrichment of foreign-source uranium. 51 Fed. Reg. 3,624 (1986).

On July 29, 1986, more than one month after the district court's issuance of the order challenged here, DOE issued a final rule. 51 Fed. Reg. 27,132. DOE concluded that, notwithstanding the non-viability of the domestic uranium industry, it would not impose restrictions on the enrichment of foreign-source uranium. One evident purpose of the rulemaking was to attempt to strengthen DOE's litigating posture on appeal in defense of its interpretation of Section 161(v) in the present litigation:

DOE believes that the *Western Nuclear* judgment is erroneous. . . . DOE is mindful of the ongoing nature of the *Western Nuclear* litigation. Section 762.3 [the rule refusing to impose enrichment restrictions] is being adopted at this time, notwithstanding the *Western Nuclear* litigation, in order to formally record DOE's interpretation of section 161(v), to state DOE's determination that restrictions on enrichment of foreign origin uranium would continue to be inappropriate, to establish the criterion that will be applicable to the enrichment of foreign origin uranium, and to permit Congressional review of that criterion.

*Id.* at 27,134 n.4.<sup>13</sup>

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<sup>12</sup> The petition for certiorari does not address the merits of the district court's decision on this issue.

<sup>13</sup> In the rulemaking, DOE attempted to justify its refusal to impose restrictions on the enrichment of foreign uranium. *Id.* at 27,134-38. DOE argued that Section 161(v) requires restrictions



On October 18, 1986, Congress enacted Section 305 of Pub. L. No. 99-500, 100 Stat. 1783-209.<sup>14</sup> Section 305 provides, *inter alia*, that no provision of DOE's July 1986 final rule "shall affect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities." 100 Stat. 1783-210.

On July 20, 1987, the court of appeals affirmed the district court's order. Pet. App. 1a-21a. Noting that it was required to accord "great deference" to the agency's interpretation of the statute, *id.* at 14a-15a, the court nonetheless concluded that DOE's position was contrary to the express language and legislative history of Section 161(v). The court observed that DOE "cannot accomplish its statutory purpose—the maintenance of a viable domestic uranium industry—without imposing restrictions on enrichment of foreign uranium. Rather, the DOE proposes to abandon the statutory goal." *Id.* at 18a. The court concluded:

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only if DOE makes a finding that such restrictions "are needed to, and in fact, will assure the maintenance of a viable domestic uranium industry." *Id.* at 27,134. DOE asserted that restrictions would not be sufficient to restore the viability of the domestic industry because restrictions would have the effect of increasing the cost of DOE's enrichment services, and DOE could not insure that its enrichment customers would not seek to have foreign uranium enriched by DOE's lower-priced foreign competitors. *Id.* at 27,135-38. Furthermore, DOE asserted that, notwithstanding the poor health of the domestic uranium industry, DOE has a "responsibility to maintain a healthy enrichment program which transcends economic considerations." *Id.* at 27,137 (emphasis added). In other words, DOE claimed that enrichment restrictions would be inappropriate because they would conflict with other policy objectives unrelated to the viability of the domestic industry.

<sup>14</sup> Section 305 of Pub. L. No. 99-500 is set forth in an appendix to this brief. App., *infra*, 1a-3a.

The unambiguous language of the statute requires the DOE to refuse enrichment of foreign uranium "to the extent necessary to assure" a viable domestic industry. The DOE may determine how much restriction is required to ensure viability, but it cannot decide not to impose restrictions when the industry is not viable. It must continue to increase restrictions until the domestic industry becomes viable. The DOE's argument that this policy is not wise in the present uranium market should be made to Congress and not to the courts. We can only apply the statute as Congress passed it.

*Id.*

### ARGUMENT

This case involves a narrow issue of statutory construction, and petitioners have identified no general legal principle implicated here that would affect the disposition of any other case. Moreover, the decision below is correct and concededly does not conflict with the decision of any other court. Thus, under this Court's traditional certiorari criteria, further review is unwarranted.

1. Notwithstanding petitioners' efforts to rewrite the statute and the legislative history, and DOE's post hoc attempt to bolster its litigation posture through rulemaking, the decision below is clearly correct.

a. Section 161(v) plainly states that DOE "shall not offer" its enrichment services for foreign uranium, "to the extent necessary to assure the maintenance of a viable domestic uranium industry." It is undisputed that the domestic uranium industry is not presently viable, but DOE continues to enrich foreign uranium without restrictions.

Petitioners attempt to defend DOE's actions by contending (Pet. 17) that, as a "triggering" condition precedent to the imposition of enrichment restrictions under the statute, DOE must first find that such restrictions would in fact resuscitate a non-viable domestic uranium



industry. But nothing in the statute mentions such a "trigger" or suggests that DOE is empowered to make such a finding. Instead, the statute permits DOE to enrich foreign uranium only to the extent consistent with the maintenance of a viable domestic uranium industry.<sup>15</sup> If the domestic industry is *not* viable, DOE has no authority simply to ignore the command that it not offer enrichment services for foreign uranium to the extent necessary to assure viability. In such a situation, if DOE has not imposed any restrictions on the enrichment of foreign uranium, then it has failed to perform the duty required by statute.

b. The legislative history confirms that both courts below were correct in their reading of the statute. Congress clearly intended the statute as a mandatory command "not to offer such [enrichment] services," and it intended that the command be heeded "to the extent necessary to assure the maintenance of a viable domestic uranium industry." S. Rep. No. 1325, *supra*, at 30 (App., *infra*, 4a) ; *see also* pp. 2-3, *supra*.

To support their contrary position, petitioners select out-of-context snippets from a report by the Joint Committee, to the effect that Section 161(v) would impose a "flexible" restriction and would require the agency to "offer or refuse to offer enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium industry."<sup>16</sup> Viewed in context, these statements are entirely consistent with respondents' position, and refute the position taken by petitioners.

<sup>15</sup> As the court of appeals concluded, Pet. App. 17a-18a, the statute permits restrictions of less than 100 percent only if such lesser restrictions would assure the viability of the domestic industry.

<sup>16</sup> The italicized phrase "or refuse to offer" is omitted from petitioners' selective quotation. Compare Pet. 18 with S. Rep. No. 1325, *supra*, at 31. Respondents invite the Court's attention to the entire passage from the Joint Committee's report, which is set forth in an appendix to this brief. App., *infra*, 4a-5a.

As the Joint Committee explained, the term "flexible" in this context denotes, not flexibility as to whether or not to impose any restrictions when the viability of the domestic industry is threatened, but only flexibility "as to the duration and degree of the restriction." S. Rep. No. 1325, *supra*, at 31 (App., *infra*, 5a). It is clear in context that Congress viewed Section 161(v) as an alternative to a proposed outright ban on foreign enrichment that would have expired automatically after ten years. *Id.* at 30-31 (App., *infra*, 4a-5a). Instead, Congress enacted a flexible ban keyed to maintaining the viability of the domestic industry.

Petitioners contend (Pet. 18) that the Committee's use of the phrase "in its opinion" indicates that the statute "was thought of as a standard calling for the exercise of judgment by the Secretary, not as an automatic cutoff." Petitioners, however, conveniently ignore the fact that DOE has not exercised its judgment so as to assure the viability of the domestic industry. Rather, it has violated the statutory mandate by continuing to offer enrichment services on a basis that, "in its opinion," undoubtedly will *not* assure the maintenance of a viable domestic uranium industry.

c. Petitioners' reliance (Pet. 19-21) on *Young v. Community Nutrition Institute*, 106 S. Ct. 2360 (1986), is entirely misplaced. The statute in *Young* provided that, when certain poisonous substances were unavoidably present in food, "the Secretary shall promulgate regulations limiting the quantity therein or thereon to the extent that he finds necessary for the protection of public health." *Id.* at 2363, *quoting* 21 U.S.C. § 346. The Court in *Young* deferred to the agency's long-standing interpretation that the phrase "to the extent that he finds necessary" modified "shall promulgate regulations." Under this interpretation, the Secretary had discretion to "find" the extent to which it was necessary to promulgate regulations in order to fulfill the statutory purpose of the "protection of public health." The Secretary in

*Young* had decided that "action levels," rather than formally-promulgated "tolerance levels," would achieve the statutory purpose.

In this case, there is no dispute that the phrase "to the extent necessary" modifies the phrase "shall not offer." The critical distinction, however, is that in *Young* the agency determined that it could achieve the statutory purpose—the protection of public health—by means other than formal regulations. Here, as the court of appeals concluded, Pet. App. 18a, DOE has simply abandoned the statutory goal of assuring the viability of the domestic uranium industry. Unlike the agency in *Young*, DOE has not performed the statutorily mandated action—restricting the enrichment of foreign uranium—"to the extent necessary" to achieve the statutory purpose.

Nor is petitioners' position grounded on a well-settled agency interpretation of the statute warranting judicial deference, as in *Young*. On the contrary, petitioners' present position directly conflicts with the position taken by the agency through the years. See pp. 2-3, *supra*. Thus, petitioners' current view of the statute need not be accorded deference. See *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 n.30 (1987).

Furthermore, petitioners improperly seek to draw support for their new interpretation from assertions set forth in DOE's July 1986 rulemaking, which was not issued until after the district court had entered its order in this case rejecting petitioners' construction of Section 161(v). DOE's July 1986 rulemaking, which is not part of the record of this case, is merely a post hoc rationalization by the agency in support of its litigating position, and is entitled to no deference whatsoever. See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

Petitioners' heavy reliance (Pet. 11-12, 17, 21-27 & nn. 14-16, 18-19) on the July 1986 rulemaking is particularly troublesome in light of Congress' explicit direc-

tive, in Section 305 of Pub. L. No. 99-500, that "no provision" of DOE's July 1986 rules "shall affect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities." 100 Stat. 1783-210. App., *infra*, 2a-3a. Thus, Congress has spoken, and DOE's July 1986 rulemaking cannot and should not be considered in resolving the issue presented in this case.

2. As shown above, the plain language and legislative history of Section 161(v) refute petitioners' position that DOE can avoid imposing enrichment restrictions so long as the agency has not made a "triggering" finding that such restrictions "in fact, will" restore the domestic uranium industry to viability. Petitioners' position, moreover, is fatally flawed on its own terms. Petitioners have confused the question whether restrictions are *necessary* with the question whether they would be *sufficient* to assure the viability of the domestic industry. Petitioners do not claim that the domestic uranium industry cannot attain viability.<sup>17</sup> They simply assert that the single act required by Section 161(v)—restricting enrichment of foreign uranium—would not *by itself* restore the industry. But that does not mean that restrictions are not *necessary*; it means only that restrictions alone, in petitioners' view, may not be *sufficient* to ensure viability. The sufficiency *vel non* of restrictions, however, is irrelevant under the statute.<sup>18</sup>

<sup>17</sup> There is thus no basis in reality for the absurd hypothetical of exhausted domestic reserves posed by petitioners (Pet. 19). The hypothetical in any event does not illuminate congressional intent because Congress never contemplated such a fanciful situation, and would surely enact "appropriate legislation" if domestic reserves were in fact ever exhausted. See 42 U.S.C. § 2013(f).

<sup>18</sup> If the statute said that the Secretary shall restrict imports of foreign uranium "to the extent necessary to assure a positive



Petitioners' argument that enrichment restrictions would not assist the industry is in large measure premised upon DOE's lack of a complete monopoly on enrichment services (Pet. 22). But this argument overlooks the fact that the government is currently authorized by existing statutes and regulations to restrict the importation of enriched uranium, and thus has the means to prevent defection by DOE's domestic enrichment customers. *See* 42 U.S.C. § 2201(b), (p). Petitioners acknowledge that the NRC is required to deny any license to import special nuclear material that "would be inimical to the common defense and security," 42 U.S.C. § 2099, and they appear to concede that this provision would provide "authority under the Atomic Energy Act to restrict sales of enriched uranium on the secondary market or uranium imports." Pet. 8 n.5. It therefore is apparent that the government has available the means to make enrichment restrictions a powerful tool for restoring the viability of the domestic uranium industry.<sup>19</sup>

Furthermore, it is outrageous for petitioners to claim that DOE need not comply with the statute because, in their view, restrictions would not, in and of themselves, suffice to restore the presently non-viable uranium in-

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balance of trade," there would be no question that restrictions would have to be imposed when the balance of trade was negative, regardless whether the restrictions by themselves would be sufficient to restore a positive balance of trade. The agency would not have the power to pronounce the trade deficit a complex and intractable problem and refuse to impose any restrictions at all.

<sup>19</sup> The fact that the NRC, rather than DOE, has licensing authority over uranium imports provides no basis for DOE to avoid its obligations under Section 161(v). Before the AEC was abolished, that agency had sole authority to restrict both enrichment of foreign uranium and importation of uranium enriched abroad. In transferring the responsibilities of the AEC to the newly-created agencies, Congress could not have intended to permit DOE to avoid its statutory obligations through an Alphonse-Gaston approach to statutory construction.

dustry to viability. For years, DOE ignored the pleas of the domestic industry that Section 161(v) required the agency to impose enrichment restrictions in order to maintain the industry's viability. If petitioners are correct, an agency like DOE could veto a congressional policy directive simply by sitting on its hands and ignoring its statutory obligations for a long enough period of time to render action under the statute ineffective.

3. Petitioners assert (Pet. 3) that review is necessary because the case has "great practical importance." But the practical concerns raised by petitioners provide no basis for disregarding the clear intent of Congress, as reflected in the language and history of the statute, to assure the viability of the domestic uranium industry by requiring the imposition of restrictions on the enrichment of foreign uranium. As shown above, DOE appears to have abandoned that statutory purpose because of concerns about the future of DOE's enrichment program. *See* p. 8, n.13, *supra*. Congress, however, did not leave to DOE the discretion to weigh such concerns against the need to assure the viability of the uranium industry. On the contrary, Congress itself made that policy choice in enacting Section 161(v). In these circumstances, as the court of appeals correctly observed, Pet. App. 18a, petitioners' concerns are more properly addressed to Congress than to the courts.<sup>20</sup>

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<sup>20</sup> Congress in fact is currently considering legislation that would attempt both to assure the viability of the domestic uranium industry and to meet the concerns of DOE about the soundness of its enrichment enterprise. The legislation would replace Section 161(v) with a system of graduated charges payable by domestic reactor operators for the use of foreign uranium, and would turn DOE's enrichment enterprise over to a new Government-owned corporation. *See* S. Rep. No. 100-214, 100th Cong., 1st Sess. (1987) (favorable report by Senate Energy and Natural Resources Committee on S. 1846). This proposed legislation, if enacted, would render the issue presented in this case essentially moot. The pendency of the legislation reinforces the conclusion that it is



CONCLUSION

The petition for a writ of certiorari should be denied.

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Congress, not the courts, that should resolve the policy issues posed by the petition.

# **APPENDICES**

## APPENDIX A

Pub. L. No. 99-500, § 305, 100 Stat. 1783-209 to 210 (1986), provides:

SEC. 305. None of the funds provided in this joint resolution or in any other law may be used to implement the following provisions of the uranium enrichment criteria submitted to Congress on July 24, 1986:

(i) section 762.3, which specifies the permitted enrichment of source material of foreign origin for use in domestic utilization facilities;

(ii) the third sentence of section 762.11, to the extent that it provides limitations on free choice of transaction tails assays from 0.2 percent to 0.3 percent U-235 or imposition of an additional charge for selections in that range;

(iii) section 762.15, to the extent it might be construed to validate contract provisions permitting unrestricted delivery and enrichment of foreign-origin feed material after a final court decision requiring restriction of enrichment of foreign-origin source material for domestic use or permitting imposition of additional charges for customer selections of transaction tails assays within the range of 0.2 percent to 0.3 percent U-235;

(iv) any portion of the criteria or provision in any contract [*sic*] which permits or results in reduction of the amount of feed material otherwise required to be delivered to DOE by commercial customers as a result of use of source material or special nuclear material from the government stockpiles in providing toll enrichment services for commercial customers;



(v) section 762.6 hereafter, insofar as it may convey a determination of the level of unrecovered costs that must be returned to the Treasury by the enrichment program, which determination shall be made by the Congress in future legislation.

The funds provided in this joint resolution shall be used to operate the enrichment program, consistent with the spending limitations imposed by this section, on the basis that the uranium enrichment criteria submitted to Congress on July 24, 1986 (except section 762.3 thereof) are in force and effect as modified above; *Provided*, That notwithstanding the effectiveness of the criteria as described above until amended or superseded in accordance with the Atomic Energy Act, except as is otherwise specifically provided by law, foreign-origin uranium may be enriched for domestic use only until a final judgment or dismissal in the pending litigation that determines whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material, in which case the criteria shall be amended to impose such restrictions, or such unrestricted enrichment may continue, whichever is consistent with the decision of this question in the pending litigation; *Provided further*, That in expending funds hereunder, the Department shall be required to offer each customer, free of additional charge and irrespective of percentage of requirements contracted for, a transaction tails assay from 0.2 percent to 0.3 percent U-235; *Provided further*, That no provision of this joint resolution or the July 24, 1986, criteria shall affect the merits of the legal position of any of the parties concerning the questions whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in

domestic utilization facilities, and whether distribution may be made of source material or special nuclear material from the government stockpile for commercial customers, in the pending litigation in the United States Court of Appeals for the Tenth Circuit and in the United States District Court for the District of Colorado.

## APPENDIX B

Excerpt from Senate Report No. 1325, 88th Cong., 2d Sess. 30-31 (1964) :

\* \* \* \*

In the second proviso, the Commission is directed not to offer services under paragraph (A) or (B) of this subsection for source or special nuclear material of foreign origin "intended for use in a utilization facility within or under the jurisdiction of the United States." The Commission is directed not to offer such services for such material "to the extent necessary to assure the maintenance of a viable domestic uranium industry." In implementing this subsection, the Commission will be expected to examine carefully each proposed arrangement involving the enrichment of uranium of foreign origin to determine whether the enriched product is for ultimate use in a utilization facility within or under the jurisdiction of the United States.

In testifying before the Joint Committee, witnesses representing the Atomic Energy Commission stated that in the early years, following the initiation of uranium enrichment services by the Commission, uranium of foreign origin would not be toll enriched except where the enriched product was to be "reexported for foreign consumption." Commission witnesses stated that "this restriction would be removed July 1, 1975, when the civilian requirements are expected to be sufficiently high that the viability of the domestic industry would no longer be at stake." The Commission further indicated that this restriction would be subject to periodic review and possible adjustment.

In the committee's view the maintenance of a viable domestic industry is an integral part of a sound

nuclear industry and may, indeed, be closely intertwined with the defense and security interests of the United States. The committee believes that this matter is of sufficient importance to be treated specifically in the legislation.

The direction to the Commission not to offer services under this subsection for uranium of foreign origin is flexible both as to the duration and degree of the restriction. While it is possible that by 1975 substantial amounts of uranium could be freely imported into the United States for enrichment and sale on the domestic market, one cannot at this time predict, with any degree of certainty, the condition of the domestic uranium industry a decade hence.

Accordingly, the language of the bill will permit the Commission to survey periodically the condition of the domestic and world uranium markets and to offer or refuse to offer its enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium industry.

\* \* \* \*

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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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**F. CLARK HUFFMAN, ET AL., PETITIONERS**

**v.**

**WESTERN NUCLEAR, INC., ET AL.**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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**REPLY MEMORANDUM FOR THE PETITIONERS**

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**CHARLES FRIED**  
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*ON PETITION FOR A WRIT OF CERTIORARI TO  
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**REPLY MEMORANDUM FOR THE PETITIONERS**

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In our petition we demonstrated that the court of appeals seriously misconstrued 42 U.S.C. 2201(v) (§ 161(v) of the Atomic Energy Act of 1954), and that the consequences of this ruling—harm to American utilities and their customers, harm to the Department of Energy (DOE), and harm to American foreign and trade policy—make this case important and worthy of this Court's review. Respondents vigorously debate our contentions about the correct meaning of the statute. Their arguments, however, do not rehabilitate the court of appeals' erroneous holding. Moreover, respondents make no effort to dispute the practical importance of the case.

1. a. The court of appeals held (Pet. App. 17a-18a) that DOE must halt the enrichment of foreign-source uranium whenever the domestic uranium industry is not viable, even if such restrictions would do nothing to assure the industry's viability. As we explained in the petition, the statute does not say this. It says that restrictions must be imposed "to the extent necessary to assure the maintenance of a viable domestic industry" (§ 2201(v)).

We do not dispute that the purpose of Section 2201(v) is to maintain a viable domestic uranium industry (see Pet. 4-5); nor do we claim that DOE can ignore the statute's requirements. It is the court of appeals and respondents who would ignore the explicit purpose of the statute when they insist that restrictions on enrichment of foreign-source uranium be imposed whether or not they would serve the stated statutory purpose.

b. As we explained in the petition, DOE's reading of the statute is at the very least a reasonable view of the language. Accordingly, the court of appeals was required under *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986), to accept that view and not substitute its own. Respondents claim that deference is not appropriate here because DOE has abandoned the statutory goal (Resp. Br. in Opp. (Opp.) 12). But the question is not whether DOE can ignore the statutory command—of course it cannot. Rather, the question is what that command is. The Secretary has adopted a reasonable construction of the statute, which is entitled to significant weight under this Court's cases. Nor has the agency shifted its position on this interpretative question (see Opp. 12); what has changed over time are the facts, including the domestic industry's viability and whether restrictions on enrichment of foreign uranium would effect that viability. To our knowledge neither the Atomic Energy Commission nor DOE has ever endorsed the court of appeals' position that restrictions must be imposed whenever the domestic industry is not viable, whatever the effects of such restrictions on viability might be.

2. a. In this Court, respondents have advanced (Opp. 13-15) a new theory of Section 2201(v), different from that adopted by the court of appeals. They urge that the word "necessary" is used in Section 2201(v) in the sense that contrasts with "sufficient." Presumably, this would mean that DOE must impose restrictions whenever they are a necessary condition of viability, even if *other* changes

outside the control of the agency (such as a dramatic increase in demand for uranium) would also be necessary before the domestic industry would be viable. This theory improves on the rationale of the court of appeals to the extent that it recognizes that the statute demands an inquiry into the actual effect of restrictions on viability. However, respondents' new interpretation will not support the judgment below. Neither the district court nor the court of appeals found or even asked whether restrictions on the enrichment of foreign uranium were a necessary condition of the viability of the industry. Instead, the courts below held that once the domestic industry is found to be not viable, restrictions on enrichment of foreign uranium must be imposed, no matter what contribution such restrictions might make toward reviving the domestic industry. Because the court of appeals' judgment cannot be sustained on the basis of respondents' theory, we will not discuss the merits of that interpretation.

b. Respondents further suggest that if enrichment restrictions were combined with action by the Nuclear Regulatory Commission (NRC) to deny licenses for the importation of special nuclear material under 42 U.S.C. 2073(a) or 2201(b), this might return the domestic uranium industry to viability (Opp. 14-15). But again, this was not the court of appeals' rationale, and the issues it raises have never been litigated in this case. The legal powers and duties of the NRC were not addressed by the courts below,<sup>1</sup> nor were the lower courts asked to consider

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<sup>1</sup> In our petition (at 8 n.5) we erroneously stated that 42 U.S.C. 2099 requires the NRC to limit licenses of enriched uranium ("special nuclear material") when such licenses "would be inimical to the common defense and security or the health and safety of the public." In fact, Section 2099 applies to the NRC's licensing of imported "source material"—unenriched uranium or thorium (see 42 U.S.C. 2014(z)). This error is not material to any of the issues presented in this case.



whether the total elimination of imported uranium from the domestic market—both source material and special nuclear material—would restore the domestic industry to viability.<sup>2</sup> Moreover, respondents have not at any prior stage of this litigation argued that the statute obliges DOE to petition the NRC to take steps to restrict imports, nor (to our knowledge) have respondents ever suggested this to the NRC.

3. a. The petition sets out the Secretary's views concerning the likely effect of restrictions on enrichment as developed in a rulemaking that commenced while this case was before the district court. Respondents suggest that the rulemaking is "merely a post hoc rationalization by the agency in support of its litigating position" (Opp. 12). The rulemaking, however, was a proper response to this lawsuit. Respondents' original filings in this case requested the district court to order DOE to conduct a rulemaking to establish criteria restricting the importation of foreign uranium (see July 10, 1985, Mem. in Support of Motion for Summary Judgment 25). DOE in effect granted the relief requested by respondents by initiating the rulemaking to revise the criteria under which enrichment services are offered (see 10 C.F.R. Pt. 762) and to address the question whether conditions in the domestic uranium industry required restrictions on enrichment of foreign uranium.

Although respondents now evidently disagree with a critical finding of the rulemaking—that restrictions will not assure a viable domestic uranium industry—their approach to this case so far has not been to argue that this finding is wrong. Rather, they have maintained that the effects of restrictions on domestic viability are legally irrele-

<sup>2</sup> The purpose of restrictions under Section 2201(v), it must be remembered, is the maintenance of a viable domestic uranium industry, not the provision of economic assistance to the industry that will nevertheless not make it viable (see Pet. 22 n.15).

vant once the industry is determined to be not viable. The district court agreed, and granted respondents' motion for summary judgment without making any inquiry into the underlying facts about what effect the imposition of restrictions would have on the industry's future viability. The court of appeals affirmed on the same basis. In challenging the rulings below, we have referred to the rulemaking in order to explain the Secretary's view of the facts about the state of the domestic uranium industry—facts which are highly relevant under the Secretary's interpretation of the statute, and which, if they had been put in issue in the courts below, could have been tested by appropriate adversarial proceedings. We have not, however, argued that the court of appeals was wrong because the Secretary's factual conclusions were right; the court of appeals was wrong either because it thought those facts were irrelevant (see Pet. 16-21) or because it felt entitled to disagree with them without reviewing them (*id.* at 21-23). This petition seeks correction of the court of appeals' errors of law, not an affirmation of the Secretary's hitherto unchallenged factual findings.

b. Respondents contend (Opp. 13) that, because of the continuing resolution that funded DOE for the fiscal year ending September 30, 1987 (Act of Oct. 18, 1986, Pub. L. No. 99-500, § 305, 100 Stat. 1783-209 to 1783-210), "DOE's July 1986 rulemaking cannot and should not be considered in resolving the issue presented in this case." Respondents misapprehend both the continuing resolution and the rulemaking's relevance. Section 305 of the continuing resolution provides in pertinent part that "no provision of *this joint resolution* or the *July 24, 1986, criteria* shall affect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities \* \* \*" (100 Stat. 1783-210

(emphasis added)). We have not relied upon any provision of the joint resolution or the 1986 criteria in support of our interpretation of Section 2201(v) — a statute enacted in 1964. We have simply cited the explanation accompanying the promulgation of the 1986 criteria as the most authoritative expression of the Secretary's views on the legal question here presented, and his assessment of both the likely effects of enrichment restrictions on the domestic industry. This is entirely in keeping with the continuing resolution.

4. a. The court of appeals acknowledged that "[t]his case raises important issues, the resolution of which will affect not only the parties involved \* \* \* but also all utilities that use nuclear power as well as the eventual consumers who purchase power from such utilities" (Pet. App. 3a). Our petition (at 23-28) set forth the reasons why this case is important. Respondents do not challenge these assertions, and we will not repeat them except to say that this case unquestionably involves very large sums of money and highly sensitive questions of United States foreign trade, nuclear cooperation and nuclear non-proliferation policy. Indeed, the difficulties that this case poses for United States foreign relations are illustrated by the fact that the Governments of Australia and Canada have filed amicus briefs.<sup>3</sup>

b. Respondents imply (Opp. 9) that when a case involves only a question of statutory construction, and the deference due the agency, it cannot rise to the level of importance needed to invoke Supreme Court review. This

<sup>3</sup> We do not necessarily agree with all of the assertions in those briefs about the United States' obligations under international agreements and international law. The concern shown by Australia and Canada, however, and the issues they raise, demonstrate that this case implicates matters of utmost importance to some of our trading partners.

Court, however, has repeatedly granted certiorari to examine the standards a court should apply in reviewing an agency's interpretation of its own statute. See, e.g., *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *United States v. Rutherford*, 442 U.S. 544 (1979). Moreover, the Court has granted certiorari where the issues simply "concern the construction of a major federal statute" (*United States v. Donovan*, 429 U.S. 413, 422 (1977)), even where no conflict in the circuits had developed (e.g., *Young v. Community Nutrition Inst.*, *supra*).<sup>4</sup>

c. Respondents also contend (Opp. 15-16 n.20) that pending legislation may moot this case. They refer to S. 1846, 100th Cong., 1st Sess. (1987), a bill that would, inter alia, eliminate Section 2201(v) while creating a government corporation to carry out the nation's enrichment business. The legislation, however, has not been passed by either the House or the Senate, and it remains highly speculative whether it or anything else on the subject will be enacted. Section 2201(v) remains in effect, and the Tenth Circuit's misreading of the statute will continue to impose severe adverse consequences for the United States as long as DOE is subject to it.

We agree with respondents that neither the adverse consequences of the judgment below nor anything else would be a basis for "disregarding the clear intent of Congress, as reflected in the language and history of the statute" (Opp. 15). The issue here is the meaning of Section 2201(v), not its wisdom. As we said in our petition (at 27-28), the policy

<sup>4</sup> As we explained in our petition (at 16 & n.13), the court of appeals' decision upholds what is in effect a nationwide injunction prohibiting DOE from any enrichment of foreign uranium. In these circumstances, it is highly unlikely that a circuit conflict would ever develop.

of Congress "must be followed until Congress changes it, whatever the consequences." We submit that the court of appeals' interpretation of that policy is sufficiently doubtful, and the adverse consequences of that ruling are sufficiently grave, that review by this Court is clearly warranted.

The petition for a writ of certiorari should be granted.  
Respectfully submitted.

CHARLES FRIED  
*Solicitor General*

DECEMBER 1987



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**BRIEF OF THE GOVERNMENT OF AUSTRALIA AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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**QUESTION PRESENTED**

Whether, as Congress intended, 42 U.S.C. § 2201(v) should be interpreted so as to be consistent with the U.S. Government's obligations under the General Agreement on Tariffs and Trade.

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**BRIEF OF THE GOVERNMENT OF AUSTRALIA AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

---

Having obtained the written consent of the parties pursuant to Rule 36.1 of the Rules of this Court, the Government of Australia submits this brief as amicus curiae in support of the petition for a writ of certiorari.

**INTEREST OF THE GOVERNMENT OF AUSTRALIA**

The United States is the world's largest commercial market for uranium. Australia has the largest uranium reserves of any non-Communist country and has been a reliable and stable supplier of uranium to the United States. U.S. electric utilities have entered into long-

term contracts through 2005 to purchase more than 15,000 short tons of uranium from Australia worth hundreds of millions of dollars.<sup>1</sup> The Australian uranium industry has made very substantial investment and trading decisions in reasonable reliance on the expectation of continued access to the U.S. market.

As one of the United States' closest allies, the Commonwealth of Australia is a party with the United States in numerous international trade and nuclear non-proliferation agreements. Since 1970 the Australian and United States Governments have cooperated closely in international fora in promoting the objective of non-proliferation under the Nuclear Non-Proliferation Treaty.<sup>2</sup> As part of this cooperative commitment Australia has consciously circumscribed the commercial outlets available to its domestic uranium industry in order to add further impetus to the non-proliferation objective and to seek to strengthen the applicability of nuclear safeguards.

The decision of the court below requires the U.S. Department of Energy to terminate the provision of all enrichment services to foreign uranium intended for use in the United States. Even though this would not directly prohibit the importation of unenriched uranium, its practical effect would be to restrict such importation. If not overturned, that judicial reversal of current Executive Branch international trade policy will, in the view of the Australian Government, place the U.S. Gov-

<sup>1</sup> It has been estimated that, for the period between 1985 and 1990, U.S. utilities have contracted for about \$780 million worth of foreign uranium. Emergency Motion of the Appellants for Stay Pending Certiorari to the United States Supreme Court at 7 (filed in *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430 (10th Cir. 1987) (No. 86-1942)).

<sup>2</sup> Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483; T.I.A.S. No. 6839; 729 U.N.T.S. 161.

ernment in violation of its obligations to the Australian Government under the General Agreement on Tariffs and Trade ("GATT").<sup>3</sup> It will also do serious injury to the Australian uranium industry, which relies solely upon exporting. The flow of Australian uranium to the United States will be severely restricted, and U.S. utilities may be caused to breach their very substantial long-term supply contracts with Australian uranium producers.

### REASONS FOR GRANTING THE PETITION

On several occasions the Australian Government has officially notified the U.S. Government of its concern over the lower courts' decisions in this case and its view that compliance with their orders would breach Australia's entitlements and the U.S. Government's commitments under the GATT.<sup>4</sup>

The Solicitor General has recognized the seriousness of these concerns in his petition to this Court by stating that, if left unreviewed, the lower court's decision "will have very serious adverse consequences for . . . United States trade, nuclear cooperation and nonproliferation policies." Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit at 23-24.

The Australian Government supports the persuasive domestic law arguments advanced by the Solicitor General to explain his contention that the court of appeals' decision is "seriously flawed." *Id.* at 15. However, the Australian Government submits that there is an additional important reason to grant the petition for review. The lower court's interpretation of 42 U.S.C. § 2201(v) is erroneous because Congress expressly intended that

<sup>3</sup> October 30, 1947, 61 Stat. pts. 5, 6; T.I.A.S. No. 1700; 55 U.N.T.S. 61.

<sup>4</sup> See Diplomatic Note No. 186/86A, (June 27, 1986) reprinted as Appendix No. 1 to this Brief; Diplomatic Note No. 237/87 (July 24, 1987) reprinted as Appendix No. 2 to this Brief.



provision to be consistent with the U.S. Government's GATT obligations. As will be developed below, the lower court's interpretation of the provision would render this statute wholly inconsistent with the U.S. Government's obligations under the GATT, which is recognized as a part of U.S. law.

### ARGUMENT

#### CONGRESS INTENDED SECTION 2201(v) TO BE CONSISTENT WITH THE GATT, WHICH IS A PART OF U.S. LAW, AND THE LOWER COURTS' INTERPRETATION OF THAT STATUTE CANNOT BE RECONCILED WITH THE GATT

##### A. The GATT Is Part of U.S. Law

The GATT is a multilateral international agreement to which Australia and the United States are parties. This Court has stated that the GATT "is followed by every major trading nation in the world . . . ." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457 (1978). In the United States the GATT has been applied provisionally since 1948 pursuant to the Protocol of Provisional Application of the GATT. *See* 61 Stat. pts. 5, 6; T.I.A.S. No. 1700; 55 U.N.T.S. 61. The portions of the GATT relevant to this case have been proclaimed by the President, Proclamation No. 2761A, T.D. 51802, 82 Treas. Dec. 305 (1947), and, consequently, are part of the domestic law of the United States. *United States v. Accurate Millinery Co.*, 42 C.C.P.A. 229, 230 (1955). *See Jackson, The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 Mich. L. Rev. 249, 293 (1967).

This Court's long standing rules for interpreting Federal statutes in light of international agreements entered into by the U.S. Government have been summarized as follows by the American Law Institute in Section 134 of the RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tent. Final Draft 1985):

Where fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law or with an international agreement of the United States.<sup>8</sup>

In addition, Section 135(1)(a) provides that:

An Act of Congress supersedes an earlier . . . provision of an international agreement as law of the United States if the purpose of the Act to supersede the earlier rule or provision is clear and if the Act and the earlier rule or provision cannot be fairly reconciled.

The Draft Restatement also notes the importance this Court has attached to the branches of the U.S. Government "speaking with one voice" on international matters and the consequent judicial practice of giving "particular" or "great" weight to the views of the Executive Branch in international matters. *Id.* at § 132, comment C. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (interpretation of U.S. Friendship, Commerce and Navigation Treaty with Japan).

In this case the Executive Branch has interpreted Section 2201(v) in a manner consistent with the U.S. Government's international obligations. The lower courts erroneously rejected that interpretation and the clear legislative history supporting it.

##### B. Congress Intended Section 2201(v) to be Consistent with the GATT

When Congress passed Section 2201(v) in 1964 it was mindful of the U.S. Government's obligations under the GATT and intended Section 2201(v) to be consistent with those obligations. The Report of the Joint Committee on Atomic Energy explaining Section 2201(v) states:

<sup>8</sup> Citing *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) and other decisions of this Court.

[T]he committee believes that these reasonable and flexible restrictions on the performance of services by the . . . [U.S. Government] should not in any sense be deemed inconsistent with any obligations the United States may have under the General Agreement on Tariffs and Trade (GATT) and other international trade agreements.

S. REP. NO. 1325, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 3105, 3121.

This expression of a Congressional intent to legislate consistently with the U.S. Government's GATT obligations could not be more clear.

In order to understand how the lower court's interpretation of Section 2201(v) is inconsistent with the U.S. Government's GATT obligations, a brief review of those obligations is required.

### C. Relevant GATT Obligations

#### 1. "National Treatment"

In Article III(1) of the GATT the parties recognize the general principle that a contracting party's domestic laws should not be applied against the products of other contracting parties "so as to afford protection to domestic production." Pursuant to this general principle, Article III(4) provides, in relevant part:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

According to the leading U.S. authority on the GATT this "national treatment" provision means that "imported goods will be accorded the same treatment as goods of local origin with respect to matters under government

control, such as taxation and regulation." J. Jackson, *WORLD TRADE AND THE LAW OF GATT* 273 (1969).

In this case, the lower court's interpretation of Section 2201(v) mandates that foreign origin uranium be treated differently from U.S. origin uranium. That difference in treatment relates to a matter under the U.S. Government's control—refusal to provide enrichment services to foreign origin uranium for U.S. end-use. That difference in treatment obviously is intended to favor U.S. origin uranium and would affect unfavorably the internal sale of foreign origin uranium in the United States. Consequently, the lower court's interpretation denies "national treatment" to foreign origin uranium within the meaning of Article III(4) of the GATT.

#### 2. Unhindered Entry into the U.S. Market

Article II(1)(a) of the GATT requires that the U.S. Government accord Australian uranium "treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule" annexed to the GATT. Under the "Kennedy Round" of GATT agreements imports of uranium from Australia are entitled to tariff free entry into the United States.<sup>6</sup>

In order to ensure that the concessions such as the free entry of Australian uranium granted under Article II(1)(a) are not negated by other domestic measures, Article XI(1) of the GATT prohibits the U.S. Government's imposition of restrictions "other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or *other measures* . . . on the

<sup>6</sup> Uranium from Australia enters the United States in several different forms under different U.S. Tariff Schedule Item Nos., *i.e.*, TSUS 422.50, 422.52 and 601.57. Each of these is at a rate of duty of "free." II GENERAL AGREEMENT ON TARIFFS AND TRADE, LEGAL INSTRUMENTS EMBODYING THE RESULTS OF THE 1964-67 TRADE CONFERENCE, sched. XX, pp. 1467, 1562 (1967).



importation of any product of the territory of any other contracting party . . ." (emphasis added).

This language is very broad and applies to "all kinds of nontariff barriers (except perhaps for those that can be said to have their impact after 'importation')." K. Dam, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 151 (1970). Thus, action by the Department of Energy implementing the lower court's order could be deemed to be a restriction on "importation" prohibited by Article XI. If the restriction is deemed to apply after "importation," the "national treatment" guarantees of Article III apply to protect the foreign item. See J. Jackson, *WORLD TRADE AND THE LAW OF GATT* at 315.

#### D. The Correct Interpretation of Section 2201(v)

The U.S. Secretary of Energy, after thorough and careful study, concluded that the proper interpretation of Section 2201(v) is that, if the domestic uranium industry is not viable, restrictions pursuant to Section 2201(v) are to be imposed only if they "are needed to, and in fact, will assure the maintenance of a viable domestic uranium industry." Uranium Enrichment Services Criteria, 51 Fed. Reg. 27,132, 27,134 (1986) (Supplementary Information). He also concluded that "structural weaknesses, not foreign competition, are the reasons for the depressed state of the domestic uranium industry" and that "restrictions would not assure the viability of the domestic mining and milling industry." *Id.* at 27,135.

The U.S. Trade Representative, the Cabinet official responsible for the U.S. Government's international trade policy, concluded that, in these circumstances, restrictions imposed pursuant to Section 2201(v) would have "an adverse impact on our trade and other relations with important trading partners without resolving the long-term problems of the industry." Letter from U.S. Trade Representative Clayton Yeutter to Secretary of Energy John Herrington (Dec. 26, 1985). In a declaration filed with

the district court in this case, the Director of Energy Trade Policy in the Office of the U.S. Trade Representative stated:

A ban on enrichment of foreign uranium would harm the commercial interests of other major trading partners such as Australia. Such a ban would be subject to legal challenge under the General Agreement on Tariffs and Trade (GATT). GATT Article III broadly prohibits member nations from adopting rules or regulations which affect the internal sale, distribution or use of goods, and which discriminate against foreign suppliers of such goods. Even if the stated ban were considered defensible under the national security exception of GATT Article XXI<sup>17</sup>, the United States might be found to owe compensation to our trading partners for the "nullification or impairment" of their benefits under the GATT. In this case, other sectors of the U.S. economy would be asked to make sacrifices for any short-term relief provided for the uranium industry.

<sup>17</sup> Article XXI(b)(i) of the GATT provides that nothing in the GATT shall be construed:

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived.

. . . .

In a letter to the Secretary of Energy, the Trade Representative explained why, in the circumstances of this case, it would be inappropriate for the U.S. Government to seek relief from imports of foreign uranium pursuant to Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, which provides relief if imports are found to be threatening U.S. national security. He stated that "[u]ranium for military uses is not an issue here, but only uranium for commercial electric generation." Letter from U.S. Trade Representative Clayton Yeutter to Secretary of Energy John Herrington (Dec. 26, 1985). This reasoning would also make Article XXI(b)(i) inapplicable to the situation at issue in this case.



Declaration of Robert A. Reinstein, ¶ 8 (filed in *Western Nuclear, Inc. v. Huffman*, (D. Colo.) (No. 84-2315)).<sup>8</sup>

Thus, having carefully considered the reasons for the domestic industry's non-viability, and in light of the U.S. Government's GATT obligations and Congress' intent, the responsible Executive Branch officials adopted a relatively narrow interpretation of Section 2201(v). This interpretation is consistent with the U.S. obligations under the GATT which limit actions restricting imported products, i.e., restrictions need not be imposed if they will not assure the maintenance of a viable domestic industry.

These Executive Branch officials also were mindful of the adverse impact that banning enrichment of foreign uranium for U.S. end-use would have on American and Australian nuclear non-proliferation policies. The Deputy Assistant Secretary of State for Nuclear Energy and Energy Technology Affairs stated, in relation to this litigation, that prohibition of enrichment of foreign uranium would create "an increased commercial incentive for the spread of nuclear enrichment technology, which has potential nuclear weapons applications." Declaration of James Devine, cited in 51 Fed. Reg. 27,132, 27,137 n.15 (1986)

<sup>8</sup> In a letter to Congressman Morris K. Udall, the Trade Representative had made the same point.

Import restrictions that are otherwise inconsistent with the GATT may be taken pursuant to the security exception provisions of GATT Article XXI. The United States and other GATT signatories have invoked this exception very infrequently because of its potential for abuse. Moreover, the drafting history of Article XXI makes it clear that the country invoking the security exception is expected to compensate its trading partners adversely affected by the import restriction by providing concessions on other items of trade. Failure to agree on such compensation could lead to retaliation by the trading partners.

Letter from U.S. Trade Representative Clayton Yeutter to Congressman Morris K. Udall (July 15, 1985).

(Dep't of Energy Final Rule, Uranium Enrichment Services Criteria). He added:

The United States Government has for many years sought to establish a reputation for the United States as a reliable nuclear trading partner as a vital component of United States non-proliferation policy. Unless the "rules of the game" for nuclear cooperation with the United States are consistent and clear, there is the risk that such cooperation will be diminished and that the credibility and influence of the United States on nuclear non-proliferation matters in both bilateral and multilateral contexts will be undermined.

*Id.*

The Solicitor General has cited this potential damage to the Executive Branch's nuclear non-proliferation policies as one of the reasons supporting this Court's review of the decision below. Petition for Writ of Certiorari to the United States Court of Appeals for Tenth Circuit at 26-27. The Australian Government supports that reasoning.

The lower court has interpreted Section 2201(v) to mean that, if the domestic industry is not viable, restrictions on enrichment of foreign source uranium for U.S. end-use "must be imposed and become increasingly aggressive, to the point of 100% restriction, until the domestic industry is rejuvenated and becomes viable." 825 F.2d at 1439. Such an interpretation obviously denies Australian uranium "national treatment" under Article III of the GATT, particularly when it is considered that the Executive Branch officials in charge of U.S. energy policy have concluded that foreign uranium is not the cause of the domestic industry's nonviability, and the restriction will not rejuvenate the industry. Similarly, a Department of Energy action implementing the lower court's interpretation could be deemed improper under Article XI of the GATT because it would be a "measure" restricting the import of Australian uranium into the

United States.<sup>9</sup> Even though the lower court's interpretation of Section 2201(v) would not prohibit imports of unenriched uranium directly, its practical effect would be to cripple such imports since they are nearly always made for the purpose of obtaining enrichment by the Department of Energy.

In sum, the Australian Government submits that well established rules of statutory interpretation require that Section 2201(v) be interpreted so that it will be consistent with the U.S. Government's international agreements. The officials of the Executive Branch responsible for the implementation of U.S. international trade agreements and energy laws have made such an interpretation. That reading must be preferred over the lower court's interpretation which constitutes a judicial reversal of Executive Branch trade policy and which could, inconsistently with the intent of Congress, place the U.S. Government in breach of its international obligations to one of its closest allies.

<sup>9</sup> The United States has itself invoked Article XI in the context of the trade in uranium. In December 1986 the U.S. Government sought consultations with the Canadian Government under Article XXIII(1) of the GATT because of the alleged infringement of U.S. rights under Article XI(1) arising from Canadian restrictions on the export of unprocessed uranium. See "Canada—Restrictions on Export of Unprocessed Uranium," GATT Doc. L/6104 (Dec. 12, 1986).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 18, 1987

## **APPENDICES**



**APPENDIX NO. 1**

[Australian Embassy Seal]

**Note No. 186/86A**

The Embassy of Australia presents its compliments to the Department of State and has the honour to refer to a decision of the United States District Court in Denver, Colorado on 20 June 1986 to provide injunctive relief to the domestic uranium industry by, inter alia, restricting the enrichment of foreign uranium in the Department of Energy's (DOE) facilities under Section 161(V) of the Atomic Energy Act. The decision of the Court, with effect from 6 June 1986, restricts enrichment of foreign uranium for end-use in the United States to a maximum of twenty five percent of material enriched in U.S. facilities in the period to 31 December 1986, and prohibits DOE from offering or providing enrichment services for such foreign uranium from 1 January 1987.

This decision will disrupt the world market for uranium, erode international confidence in the reliability and predictability of United States policies affecting international co-operation in the peaceful uses of nuclear energy, and give rise to a major problem in trade relations between our countries in that it will impact adversely and unfairly on Australia's exports of uranium to the U.S.

The Australian Government requests the United States Government to appeal the Denver Court decision with a view to maintaining unimpaired access for Australian uranium to U.S. market and enrichment facilities.

Australia is a reliable and stable supplier of energy materials, including uranium, to the world market. It has the largest low-cost uranium reserves of any Western world country. The United States, for its part, is the world's largest commercial market for uranium. U.S.

electric utility companies have contracted to purchase a proportion of their uranium requirements from Australia up to and including 1998.

The injunctive order of the Denver Court will severely disrupt the commercial operations of the Australian uranium industry. It will immediately affect Australian material already located in, and presently being shipped to, the United States which has still to be converted, enriched and fabricated and the title to which has yet not passed to the U.S. electric utility purchasers. Moreover, it could void existing contracts with U.S. electric power utilities and prevent the negotiating of any future contracts.

Increased U.S. imports of foreign uranium have been incidental to, and a symptom rather than a cause, of difficulties encountered by the U.S. uranium industry. Those difficulties had their origins in the decision of the United States in 1966 in effect to embargo uranium imports, and in the ensuing severe disruption of the world and U.S. uranium markets. The effect of that decision was subsequently compounded by the impetus it gave to the development of some otherwise non-competitive U.S. uranium production, by declining U.S. uranium ore grades, by progressive and substantial reductions in earlier projected levels of nuclear generation capacity, inventory buildups and the consequential further depressant effect on uranium market prices. The requirement of the U.S. long term fixed commitment enrichment contracts (introduced in 1974 in an atmosphere of a perceived long term supply shortage of uranium) that those enrichment contracts be supported by matching long term uranium supply contracts also contributed to the development of high cost and marginal U.S. uranium mining capacity which, in the event, could not be sustained in the face of deferred and lower than projected nuclear power generation capacity in the U.S. and elsewhere. Increased costs and delays arising from more

rigorous U.S. regulatory requirements affecting the construction and operation of nuclear power facilities have also been contributing factors. The Australian Government concurs in the assessment of the United States Trade Representative, Ambassador Yeutter, in his 24 December 1985 letter to DOE Secretary Herrington that "action under the U.S. Trade Statutes does not appear to be appropriate in regard to both the short and long term problems facing the domestic uranium mining and milling industry".

Australia and the United States have worked closely to foster international co-operation in the exploitation of nuclear energy for peaceful and verified purposes. Continued improvement in the international nuclear non-proliferation and safeguards regime is of vital importance to both countries and to the international community. Unilateral action by the United States against major uranium suppliers to the nuclear fuel cycle would prejudice the pursuit of these objectives by disrupting world nuclear trade.

Action that negates or constrains contractual uranium supply arrangements entered into with U.S. electric power utilities and involving the use of U.S. enrichment facilities will damage our bilateral trade and commercial relations. Aside from its effect on existing contractual arrangements with U.S. utilities, the Denver Court Order will mean that the displacement of foreign uranium by artificially-induced additional production of higher cost U.S. uranium will disrupt the remainder of the world uranium market. A further undesirable consequence could be the development of a two-tiered price for uranium in the world market. Such a development whereby U.S. consumers would be denied the ability to purchase energy inputs at prices comparable to those paid by its trading partners, would appear to be inconsistent with the U.S. national interest and inimical to the further liberalisation of the world trading system.

The effect of the Denver Court Order will be to exacerbate a growing imbalance of opportunity in our bilateral trade. The United States already has a more than two-fold favourable balance of trade with Australia, increasing in our 1984/85 fiscal year to a surplus of Dollars Australian 3.2 billion over U.S. imports from Australia. A major factor in that imbalance is the fact that up to one third of Australia's exports to the U.S. are already subject to non-tariff import constraints. In these and other circumstances described above, it would, in the Australian view, be totally unjustified to extend the range and level of U.S. trade barriers against imports from Australia.

The Denver Court Order does not, of course, invalidate or diminish the commitment of the United States under the General Agreement of Tariffs and Trade (GATT). Action in the terms embodied in the Court Order affecting Australian uranium imported into the United States would, in the view of the Australian Government, breach Australia's entitlements and U.S. commitments under the GATT.

The Embassy of Australia takes this opportunity to renew to the Department of State the assurance of its highest consideration.

[Australian Embassy Seal]

Washington D.C.

27 June 1986

## APPENDIX NO. 2

[Australian Embassy Seal]

*Note No. 237/87*

The Embassy of Australia presents its compliments to the Department of State and has the honour to refer to a decision of the United States Court of Appeals for the Tenth Circuit on 20 July 1987 to affirm the decision of the District Court in Denver, Colorado, on 20 June 1986 to provide injunctive relief to the domestic uranium industry by, inter alia, restricting the enrichment of foreign uranium in the Department of Energy's facilities under Section 161(V) of the Atomic Energy Act.

Australia is a reliable, low-cost and stable supplier of uranium to the world market. These factors have been recognised by U.S. electric utility companies which have contracted for long-term purchases of Australian uranium to beyond 2000 and which are in the process of negotiating further long-term contracts.

An injunctive order to prohibit the Department of Energy from providing enrichment services for foreign uranium end-use in the U.S. could affect existing Australian contracts and prevent the signing of further contracts. Such a development would severely disrupt commercial operations of the Australian uranium industry which has reasonably based investment and trading decisions on the expectation of unhindered access to the U.S. market. Moreover, the displacement of Australian and other foreign sourced uranium by higher cost, protected U.S. material would disrupt the remainder of the world uranium market with uncertain consequences for future international co-operation in the peaceful uses of nuclear energy.

The effect of the decision to preclude foreign uranium from end-use in the U.S. will inevitably result in a resurgence in growth of otherwise non-competitive domestic



production and differential pricing between the U.S. and other world consumers. Such a development would not appear to be consistent with U.S. national interest or U.S. attitudes, recently expressed, towards liberalisation of world trade.

Exclusion of Australian uranium from the U.S. market will exacerbate a growing imbalance in our bilateral trade. The United States already has a more than two fold favourable balance of trade with Australia, increasing in our 1986 fiscal year to a surplus of \$A4.1 billion over U.S. imports from Australia. A major factor in this imbalance is the fact that up to one-third of Australia's exports to the U.S. are already subject to non-tariff import constraints. In these circumstances, it would be totally unjustified to extend the range and level of U.S. trade barriers to include uranium imports from Australia.

Additionally, the effective restriction of entry of Australian uranium to the U.S. market is clearly inconsistent with the U.S. GATT obligations and contrary to the declarations against protectionism made by the U.S. at Punta del Este.

The Australian Government requests the United States Government to seek a stay of the Court of Appeals' decision, to appeal the Court's decision and to adopt every other available mechanism, legal, administrative and legislative, to ensure that limitations of the Department of Energy's enrichment of foreign uranium for U.S. end-use are not brought into effect.

The Embassy of Australia takes this opportunity to renew to the Department of State the assurances of its highest consideration.

[Australian Embassy Seal]

Washington, D.C.

24 July 1987

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JOSEPH A. SPANIOLO, JR.,  
CLERK

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1987

F. CLARK HUFFMAN, *et al.*,  
*Petitioners*

v.

WESTERN NUCLEAR, INC. *et al.*,  
*Respondents*

On a Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Tenth Circuit

BRIEF OF ELDORADO NUCLEAR LIMITED, AMOK  
LTD., SASKATCHEWAN MINING DEVELOPMENT  
CORPORATION, URANERZ EXPLORATION AND  
MINING LTD., AND THE GOVERNMENTS OF CAN-  
ADA, THE PROVINCE OF SASKATCHEWAN, AND  
THE PROVINCE OF ONTARIO AS AMICI CURIAE  
IN SUPPORT OF THE PETITION FOR A WRIT OF  
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Corporation, Uranerz Exploration  
and Mining Ltd., and the Govern-  
ments of Canada, the Province of  
Saskatchewan, and the Province of  
Ontario.

November 18, 1987

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No. 87-645

IN THE

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OCTOBER TERM, 1987

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v.

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**BRIEF OF ELDORADO NUCLEAR LIMITED, AMOK  
LTD., SASKATCHEWAN MINING DEVELOPMENT  
CORPORATION, URANERZ EXPLORATION AND  
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ADA, THE PROVINCE OF SASKATCHEWAN, AND  
THE PROVINCE OF ONTARIO AS AMICI CURIAE  
IN SUPPORT OF THE PETITION FOR A WRIT OF  
CERTIORARI**

Pursuant to Rule 36 of the Rules of this Court, Eldorado Nuclear Limited, Amok Ltd., Saskatchewan Mining Development Corporation, Uranerz Exploration and Mining Ltd. ("the Canadian producers") and the Governments of Canada, the Province of Saskatchewan and the Province of Ontario<sup>1</sup> respectfully submit this brief as *amici curiae* in support of the Solicitor General's petition for a writ of certiorari to review the

<sup>1</sup> The Canadian producers and the three Governments are referred to collectively as "the Canadian Interests."

judgment of the United States Court of Appeals for the Tenth Circuit, upholding the decision of the District Court for the District of Colorado which enjoined the Secretary of Energy from enriching foreign uranium. Both the petitioners and the respondents have consented to the filing of this brief, and the written consents have been filed with the Clerk of the Court.

### INTEREST OF THE AMICI CURIAE

Canada is the western world's largest producer and exporter of uranium. It enjoys a comparative advantage in uranium with production from some of the world's richest uranium deposits at relatively low production costs. The Canadian uranium industry shipped 10,977 metric tons of uranium in 1986, valued at Cdn. \$923.8 million dollars. Over one-third of these shipments were exported to the United States in 1986. The Canadian producers appearing as *amici curiae* account for approximately sixty percent of total Canadian production and sixty-eight percent of scheduled deliveries of Canadian uranium to the United States over the period 1987 to 1991. The Canadian uranium industry provides thousands of jobs and is an important component of the Canadian economy. The Provinces of Saskatchewan and Ontario, which have jurisdiction over natural resources, including mineral resources, within their boundaries, obtain substantial revenues from the royalties charged to mining companies for extraction of uranium.

The district court's injunction would erect a significant barrier to the free flow of uranium in the international marketplace and would completely bar the flow of natural, unenriched uranium into the United States. Canada—as the largest foreign supplier of uranium to the United States market—will be particularly affected if the lower court's decision is upheld. The final resolution of the responsibilities and obligations of the Secretary of Energy ("the Secretary") under Section 161(v) of the Atomic Energy Act will therefore have direct repercussions upon the Canadian Interests and upon trade relations generally between the United States and Canada, its largest trading partner.

The Canadian Interests clearly have a substantial stake in the outcome of this litigation. The Government of Canada stated in a Diplomatic Note submitted to the United States Department of State that "Canada will be the foreign supplier most adversely affected by this restriction [imposed by the lower court's decision]," and urged the Government of the United States to appeal the lower court's decision. (Diplomatic Note No. 194, from the Embassy of Canada (July 22, 1987), attached as Appendix A, at 2a ("Diplomatic Note").) The Canadian Interests are in a better position than are the parties to address the significance of the decision below upon the free flow of trade in uranium and upon United States-Canadian trade relations generally.

### INTRODUCTION

The Court of Appeals for the Tenth Circuit upheld the district court's decision that Section 161(v) of the Atomic Energy Act of 1954, as amended ("the Atomic Energy Act"), required the Secretary to restrict the enrichment of foreign uranium, regardless of whether such restrictions would help to "assure the maintenance of a viable domestic uranium industry." (42 U.S.C. § 2201(v) (1982).) This interpretation is inconsistent with a decision of this Court in a closely analogous case, it effectively rewrites the statute at issue, and it ignores the specific factual findings of the agency entrusted to administer the statute.

This case, therefore, goes far beyond a simple question of statutory interpretation. The Court of Appeals itself acknowledged that the case "raises important issues, the resolution of which will affect not only the parties involved in this suit but also all utilities that use nuclear power as well as the eventual consumers who purchase power from such utilities." (Petition for a Writ of Certiorari, Appendix at 3a, *Huffman v. Western Nuclear, Inc.*, No. 87-645 ("Pet. App.")). In addition, the decision directly affects the free flow of uranium in international trade and the uranium producing industry world-wide, and threatens vital international trade relationships with Canada. The case therefore merits review by this Court.



## ARGUMENT

### **CERTIORARI SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF THE INTERESTS AT STAKE AND BECAUSE THE DECISION BELOW REWRITES THE STATUTE IN CONTRAVENTION OF THIS COURT'S PRECEDENT**

#### **A. The Relevant Facts**

The United States Congress has determined that regulation and supervision of the domestic uranium industry is an important component of the United States nuclear energy system. To this end, Congress directed the Secretary to restrict enrichment of foreign uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry." (Section 161(v) of the Atomic Energy Act, 42 U.S.C. § 2201(v).) Pursuant to this directive, the Secretary imposed restrictions on the enrichment of foreign uranium in 1967. However, the Secretary began a phase-out of the restrictions in 1977, which was completed in 1984.

The Secretary subsequently made findings, pursuant to Section 170B of the Atomic Energy Act (42 U.S.C. § 2210(b)), that the domestic industry had not been viable in 1984 and 1985. However, he also concluded that the reimposition of restrictions on enrichment of foreign uranium would in no way assist, much less "assure," the viability of the domestic uranium industry. (Uranium Enrichment Services Criteria, 51 Fed. Reg. 27,132, 27,138 (1986) codified at 10 C.F.R. 762 (1987).) The Secretary therefore determined, in full accord with the plain language and the purpose of the statute, that he would not restrict the enrichment of foreign uranium because to do so would be pointless and would not "assure . . . the viability" of the domestic uranium industry. (*Id.*)

#### **B. The Decision Below Will Have A Serious Impact on United States-Canadian Trade Relations**

The lower court's decision will have far-reaching negative consequences for United States-Canadian trade relations generally. Neither the District Court nor the Court of Appeals for the

Tenth Circuit considered the broader context in which this case must be viewed.

The lower court's order amounts to nothing less than a unilateral reversal of United States trade policy towards Canada and the erection of a significant non-tariff trade barrier. Such a policy reversal is particularly troubling in light of the Secretary's specific finding that restrictions on enrichment of foreign uranium would not help the domestic industry become viable. (51 Fed. Reg. at 27,138 (1986).)

In addition, the district court's injunction threatens vital international trade relationships. Officials of both the Canadian and United States governments have attested to the grave consequences that the district court's injunction would have on United States-Canadian trade relations. In a Diplomatic Note submitted to the Department of State, the Canadian government stated that the lower court's decision "will severely disrupt Canadian exports of uranium to the United States, will have harmful implications for the international uranium market, and will give rise to major trade irritants between the United States and its current suppliers of uranium." (Diplomatic Note, Appendix A at 1a.) The Government of Canada also informed the Department of State that restrictions on the enrichment of foreign uranium under Section 161(v) would be "clearly inconsistent" with the United States' obligations under the General Agreement on Tariffs and Trade.<sup>2</sup> (*Id.*) In light of these considerations, the Government of Canada "urge[d] the Government of the United States to appeal this Court decision. . . ." (*Id.* at 2a.)

Echoing these concerns, the United States Trade Representative, in a letter to the Secretary of Energy, stated that restrictions on foreign uranium would have "an adverse impact

<sup>2</sup> Article III of the General Agreement on Tariffs and Trade prohibits member nations from regulating the internal sale or use of goods in a manner which "afford[s] protection to domestic production." General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. III, 61 Stat. (5), (6), T.I.A.S. No. 1700, 55 U.N.T.S. 194, as amended. The lower court's injunction—by prohibiting the Secretary from enriching foreign uranium while permitting him to continue enriching domestically-produced uranium—would contravene this basic "national treatment" obligation.



on our trade and other relations with important trading partners without solving the long term problems of the industry." (51 Fed. Reg. at 27,137 n.17 (quoting letter).) And the Office of the United States Trade Representative submitted a declaration to the District Court stating that entry of the injunction "will have major adverse effects on the trade policy of the United States," and that the injunction "would be particularly damaging to trade relations with Canada." (Declaration of Robert A. Reinstein, Director of Energy Trade Policy, Office of the United States Trade Representative (June 13, 1986), attached as Appendix B at 2b.)

Finally, the lower court's decision not only greatly restricts United States-Canadian trade in uranium, but as the Government of Canada has stated, the imposition of new restrictions on the enrichment of Canadian uranium "would be completely at odds with current efforts to negotiate a free-trade agreement between our two countries." (Diplomatic Note, Appendix A at 1a.)<sup>3</sup>

<sup>3</sup> On October 4, 1987, after the Government of Canada's Diplomatic Note was submitted, the United States and Canada reached an agreement in principle on the Elements of a Canada-United States Free Trade Agreement. The agreement provides, *inter alia*, that both countries agree to "assure the freest possible bilateral trade in energy..." (Elements of Canada-United States Free Trade Agreement, October 4, 1987, excerpts attached as Appendix C at 2c.) Specifically, the Agreement states that, "The United States has agreed to: (1) eliminate the legislative restriction [42 U.S.C. § 2201(v)] on enrichment of Canadian uranium..." (*Id.* at 3c.)

The fact that the "essential elements" of a Free Trade Agreement have been agreed to should not, however, deter this Court from granting certiorari in this case. The Agreement is still preliminary; the language of the final agreement must still be drafted. It must then be presented to and approved by both the Canadian Parliament and by the United States Congress. The Court should not speculate on whether or not the Free Trade Agreement will become law and what the final terms of that Agreement might be. For example, effectiveness of the provision with respect to uranium enrichment might be delayed beyond the effective date of the Agreement itself, as will be other provisions in the Agreement. Moreover, even if both countries adopt the Free Trade Agreement, the lower court's decision would still restrict the enrichment of foreign uranium imported from other important allies and trading partners, most notably Australia. Finally, the Agreement will not take effect until January 1, 1989, so that refusal to grant certiorari would result in a restriction on the enrichment of Canadian uranium at least until that date.

### C. The Decision of the Court of Appeals Is In Direct Conflict With A Decision of This Court

The lower court's decision directly conflicts with this Court's precedent in *Young v. Community Nutrition Institute*, No. 85-664, slip op. (U.S. June 17, 1986). Federal agencies, such as the Department of Energy, depend upon consistent judicial decisions to assist them in interpreting the complex statutes which many agencies must administer. Contradictory judicial interpretations of closely analogous statutes can hinder effective and consistent agency action. The need for this Court to reconcile such inconsistencies is particularly compelling in this case, in which such vital and far-reaching interests are at stake.

In *Young*, the relevant statute stated that the Food and Drug Administration ("FDA") "shall promulgate regulations limiting the quantity of [carcinogens] to such extent as [it] finds necessary for the protection of public health." (21 U.S.C. § 346 (1986).) The Court agreed with the FDA's interpretation that, "the phrase 'to such extent as [it] finds necessary for the protection of public health...' modifies the word 'shall.'" (Slip op. at 5-7.) This Court therefore deferred to the FDA's interpretation that it was not necessary to promulgate regulations that were not required to protect the public health. (*Id.* at 7.)

The lower court's decision simply cannot be reconciled with *Young*. The lower court reasoned that the modifying phrase in Section 161(v), "to the extent necessary to assure the maintenance of a viable domestic uranium industry," only informs the Secretary of the "amount of restriction required," and that it does not modify the phrase "shall." (Pet. App. at 17a (emphasis in original).) The lower court's reasoning, however, ignores the fact that the modifying phrase, "to the extent necessary..." immediately precedes the word "shall," whereas in *Young* the two phrases were "free-floating" and not connected. (Slip op. at 6.) If anything, the Secretary's interpretation of Section 161(v) therefore is even more rational and convincing than was the FDA's interpretation of the statute at issue in *Young*.<sup>4</sup>

<sup>4</sup> Of course, the Secretary's interpretation of Section 161(v) is entitled to deference as long as it is rational. (*Young*, slip op. at 7.) The Secretary's

#### D. The Decision of the Court of Appeals Contravenes the Plain Language of the Statute

The Secretary's interpretation of Section 161(v) satisfies his obligation under the plain language of the statute to restrict enrichment only if to do so would assist the domestic industry. The Secretary is neither required, nor indeed permitted by the statute, to impose unwarranted or futile restrictions that would not help to assure the viability of the domestic industry.

It is axiomatic that a statute must first be interpreted by analyzing the plain language of the statute itself. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). That rule applies directly to this case. On its face, Section 161(v) directs the Secretary to withhold enrichment of foreign uranium for use in the United States only "to the extent necessary to assure the maintenance of a viable domestic uranium industry." (42 U.S.C. § 2201(v) (emphasis supplied).) The lower court, however, concluded that the statute "instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed . . . ." (Pet. App. at 17a.) The lower court reasoned that such restrictions must be imposed regardless of whether or not they would assure the viability of the domestic industry. (*Id.* at 18a.)

The lower court's interpretation rewrites the plain language of the statute. Congress could have written the statute to require the Secretary to restrict enrichment of foreign uranium whenever the industry was not viable. For example, Congress could have directed that "the Secretary shall not offer enrichment services for source or special nuclear materials of foreign origin whenever he determines that the domestic industry is nonviable." Congress did not do so. Rather than imposing an automatic, mandatory requirement that the Secretary impose restrictions whenever the industry is nonviable, Congress granted the Secretary the authority to impose restrictions only

(footnote continued)

interpretation, based on his considerable experience with the statute, and on the plain language of the statute itself, clearly is entitled to great deference in these circumstances.

"to the extent necessary to assure" the viability of the domestic industry.<sup>5</sup> In other words, Congress did not substitute its judgment for the Secretary's by imposing a mandatory trigger, but instead left it to the Secretary to determine whether restrictions would assure the viability of the domestic industry. The lower court's reading disregards this critical distinction.<sup>6</sup>

#### E. The Decision of the Court of Appeals Would Lead to Absurd Results

As the Solicitor General notes, the lower court's reading would require the Secretary to restrict enrichment of foreign uranium even if the domestic industry ceased to exist. (Petition for a Writ of Certiorari at 19, *Huffman v. Western Nuclear, Inc.*, No. 87-645.) The Secretary would then be prohibited from enriching foreign uranium, even though no domestic uranium would be available for enrichment. In other words, no enrichment services could be provided by the United States.

<sup>5</sup> Congress *did* impose automatic mandatory requirements in other provisions of the Act. For example, Section 2210b(d) of the Act, as amended, directs the United States Trade Representative to request an "escape clause" investigation under 19 U.S.C. § 2251 if the Secretary determines that the domestic uranium industry is seriously injured or threatened by excessive imports. (See 42 U.S.C. § 2210b(d).) And Section 2210b(e)(1) requires the Secretary to request the Secretary of Commerce to initiate a "national security" investigation under 19 U.S.C. § 1862 where he determines that imports of uranium accounted for greater than 37.5 percent of domestic requirements for two consecutive years. (See 42 U.S.C. § 2210b(e)(1).) Those provisions—with their automatic triggers—must be contrasted with the structure of Section 161(v), which requires the Secretary to act only "to the extent necessary to assure . . . ."

<sup>6</sup> The lower court's interpretation of Section 161(v) also disregards the Secretary's specific factual finding that restricting the enrichment of foreign uranium would not assist the domestic industry. (51 Fed. Reg. at 27,138.) The lower court stated that such restrictions should be imposed "until the domestic industry is rejuvenated and becomes viable." (Pet. App. at 17a.) This directive assumes a causal link between enrichment of foreign uranium and the health of the domestic industry which the Secretary has specifically found does not exist. The lower court improperly substituted its judgment with respect to the facts for that of the Secretary.

The courts cannot assume that Congress would have intended such an absurd result.<sup>7</sup> See, e.g., *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("[A]bsurd results are to be avoided" in interpreting statutes).

<sup>7</sup> The Court of Appeals also stated that under the Secretary's interpretation of the statute, "the DOE proposes to abandon the statutory goal." (Pet. App. at 18a.) This is incorrect. DOE has never proposed to abandon the statutory goal, nor has it even challenged the logic of the statute. (51 Fed. Reg. 27,132 *et seq.* (1986).) Rather, based upon his expertise, the Secretary has concluded that under present circumstances restrictions on enrichment of foreign uranium would not meet the condition precedent spelled out in the statute that any such restrictions be imposed only if they would assure the viability of the domestic industry. (*Id.*) This represents not an abandonment of the statutory goal, but a compliance with the directives of Congress that such restrictions be imposed only "to the extent necessary" to assure the viability of the domestic industry.

## CONCLUSION

For the foregoing reasons, the Canadian Interests respectfully urge that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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and Mining Ltd., and the  
Governments of Canada, the Province  
of Saskatchewan, and the  
Province of Ontario.

November 18, 1987



## APPENDIX A

Canadian Embassy      Ambassade du Canada

## Note no. 194

The Embassy of Canada presents its compliments to the Department of State and has the honour to refer to a decision of July 20, 1987, in the United States Court of Appeals for the Tenth Circuit to provide relief to the United States' domestic uranium industry based on Section 161 (V) of the Atomic Energy Act of 1954. The court has concluded that the previous decision of the United States District Court for the District of Colorado was correct with respect to the statutory obligation under Section 161 (V), and has affirmed that injunctive relief was appropriate by enjoining the Department of Energy to limit the enrichment of uranium of foreign origin destined for use within the United States. The result of this decision is that there is now in effect a complete ban on the enrichment of foreign uranium in the United States.

It is the view of the Government of Canada that the decision, should it remain in force, will severely disrupt Canadian exports of uranium to the United States, will have harmful implications for the international uranium market, and will give rise to major trade irritants between the United States and its current suppliers of uranium. In addition, restricting the United States market to only domestic uranium would be completely at odds with current efforts to negotiate a free-trade agreement between our two countries, contrary to declarations against protectionism made at Punta del Este, and clearly inconsistent with the United States' GATT obligations.

Canada will be the foreign supplier most adversely affected by this restriction. Canada is a reliable, fair and competitive supplier of uranium to many countries and is, by far, the largest foreign supplier to the United States. One-third of Canadian uranium production is exported to meet the requirements of United States power utilities. These sales, which exceeded \$200,000,000 in 1985, represent nearly 70 percent of total U.S. uranium imports.

It must be recognized that, to the extent United States utilities choose not to purchase enrichment services abroad, the affirmation of the lower court's decision represents a total embargo on imports of uranium from Canada. The Canadian government is very concerned to see the world's largest market for uranium once again protected by unilateral non-tariff [sic] barriers as it was during the period from 1967 to 1984.

The Government of Canada urges the Government of the United States to appeal this court decision so that unrestricted access for foreign uranium will be restored. If it is found that this decision cannot be appealed, the Government of Canada would urge that all legislative and administrative avenues be actively explored to effect the elimination, or at least the significant reduction, of this unilateral import restriction.

The Embassy of Canada takes this opportunity to renew to the Department of State the assurances of its highest consideration.

[Signed and Sealed  
with Embassy seal]

July 22, 1987  
Washington, D.C.

**APPENDIX B**  
**UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF COLORADO**

WESTERN NUCLEAR, INC., *et al.*,  
*Plaintiffs,*

v.

F. CLARK HUFFMAN, *et al.*,  
*Defendants.*

Civil Action No. 84-2315

**DECLARATION OF ROBERT A. REINSTEIN**

I, Robert A. Reinstein, declare and say:

1. Since February 1982 I have been the Director of Energy Trade Policy, Office of the United States Trade Representative, Executive Office of the President. From 1975 to 1982 I was employed by the Federal Energy Administration (FEA) and the U.S. Department of Energy (DOE), which the FEA became part of in October 1977. From 1978 to 1981 I was Director of Economic and Data Analysis for DOE's Economic Regulatory Administration, serving in effect as the chief analyst for DOE's regulatory programs. In my current position I am responsible for coordination of Administration trade policy for energy and related sectors. In this capacity, I chair a number of interagency subcommittees and working groups, including the Energy Trade Policy Subcommittee of the Trade Policy Staff Committee and the interagency Uranium Working Group. I make the following statements based upon my personal knowledge and belief and upon other information conveyed to me by my advisors in the course of my official duties.

2. I am familiar with the above-referenced litigation. I have reviewed plaintiffs' proposed order, which would enjoin

the DOE from enriching source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States until the viability of the domestic uranium industry is assured. I have also reviewed the declaration of James B. Devine, Department of State, setting forth the negative foreign policy implications of plaintiffs' proposed order.

3. I understand that in determining whether to issue an injunction it is appropriate to consider the public interest, including the foreign policy and the trade policy interests of the United States. I submit this declaration to advise the Court that entry of an injunction [sic] such as plaintiffs [sic] propose will have major adverse effects on the trade policy of the United States.

4. The Office of the United States Trade Representative has collaborated with numerous other government agencies in conducting an in-depth investigation of conditions in the domestic uranium mining and milling industry. This investigation indicated that a ban on enrichment of foreign uranium is highly unlikely to render the domestic industry "viable" in any meaningful sense. On the contrary, any such restriction would discriminate against foreign suppliers of unenriched uranium and would impair the United States [sic] trading relations with some of our most important trading partners.

5. An injunction against enrichment of foreign uranium would be particularly damaging to trade relations with Canada. Canada is our largest trading partner and is also a major supplier of unenriched uranium. A ban on U.S. enrichment of Canadian feedstock would force U.S. utilities with contracts for Canadian supplies to seek enrichment services in Europe at substantially higher transportation costs. This would impair Canadian access to and competitiveness in the U.S. market and very likely depress the price of Canadian uranium in world markets. The Canadian leadership and media will interpret such a move as a significant new trade barrier, and will vociferously object. Indeed, they have already informally expressed strong concerns on this issue.

6. Plaintiffs' proposed injunction would be especially harmful at the present time. The United States and Canada have just begun negotiations towards a bilateral trade arrangement whereby both sides are seeking to remove substantially all barriers to bilateral trade in goods and services. To erect a new trade barrier at the very outset of these negotiations—without economic justification—could be construed in Canada as evidence that the U.S. government lacks genuine interest in free trade and/or lacks the ability to provide promised benefits under a free trade agreement. Such a perception would erode the base of public support for this high-visibility initiative of the current government in Canada, and complicate the task of negotiators on both sides.

7. New enrichment restrictions on foreign uranium would also seriously interfere with on-going, parallel negotiations to secure removal of certain Canadian trade barriers affecting the uranium processing industry. It is difficult to argue that Canada should remove barriers to free trade in uranium products at the same time that we are adding barriers of our own.

8. A ban on enrichment of foreign uranium would harm the commercial interests of other major trading partners such as Australia. Such a ban would be subject to legal challenge under the General Agreement on Tariffs and Trade (GATT). GATT Article III broadly prohibits member nations from adopting rules or regulations which affect the internal sale, distribution or use of goods, and which discriminate against foreign suppliers of such goods. Even if the stated ban were considered defensible under the national security exception of GATT Article XXI, the United States might be found to owe compensation to our trading partners for the "nullification or impairment" of their benefits under the GATT. In this case, other sectors of the U.S. economy would be asked to make sacrifices for any short-term relief provided for the uranium industry.

9. For all the foregoing reasons, I have concluded that implementation of an injunction against U.S. enrichment of foreign uranium would have major adverse effects on pending trade negotiations and on the trade policies of the United States.



I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 13, 1986.

[Signed]  
Robert A. Reinstein

## APPENDIX C

### EXCERPTS FROM ELEMENTS OF CANADA— UNITED STATES FREE TRADE AGREEMENT

Canadian Embassy	Public Affairs Division
Ambassade du Canada	Direction des affaires publiques
	1771 N Street, NW
Information	Washington, DC 20036-2879
	(202) 785-1400

### ELEMENTS OF CANADA—U.S. FREE TRADE AGREEMENT

October 4, 1987

Attached are 38 pages of agreed text setting out the essential elements of a Free Trade Agreement between the United States and Canada. Each was initialed by the negotiators.

For the United States:

For Canada:

s/ James Baker III  
s/ Clayton Yeutter  
s/ Peter McPherson  
s/ Peter Murphy

s/ Michael Wilson  
s/ Pat Carney  
s/ David Burney  
s/ Simon Reisman

## OBJECTIVES

The objectives of this Agreement, as elaborated more specifically in the provisions of this Agreement, are to:

(a) eliminate barriers to trade in goods and services between the territories of the Parties;

(b) facilitate conditions of fair competition within the Free Trade Area,

(c) significantly expand liberalization of conditions for investment within the Free Trade Area;

(d) establish effective procedures for the joint administration of the Agreement and the resolution of disputes;

(e) lay the foundation for further bilateral and multilateral cooperation to expand and enhance the benefits of the Agreement.

#### ARTICLE: EXTENT OF OBLIGATIONS

The Parties to this Agreement shall ensure that all necessary measures are taken in order to give effect to its provisions, including their observance, except as specifically provided elsewhere in this Agreement, by state, provincial and local governments.

#### STANDSTILL

Both Parties recognize that this agreement is subject to domestic approval on both sides. Accordingly both Parties understand the need to exercise their discretion in the period prior to entry into force so as not to jeopardize the approval process or undermine the spirit and mutual benefits of the Free Trade Agreement.

\* \* \*

#### ENERGY

There is broad agreement to assure the freest possible bilateral trade in energy, including nondiscriminatory access for the United States to Canadian energy supplies and secure market access for Canadian energy exports to the United States.

Both sides have agreed to prohibit restrictions on imports or exports, including quantitative restrictions, taxes, minimum import or export price requirements or any other equivalent measure, subject to very limited exceptions: (1) short supply or prevention of exhaustion of a finite energy resource, but only if the exporting Party provides proportional access to the diminished supply and does not otherwise discriminate on price; or (2) national security, to supply military establishment or critical defense contracts, respond to a situation of armed

conflict, prevent nuclear proliferation or respond to direct threats to supply of nuclear materials for defense purposes.

Parties will consult on energy regulatory actions which could directly result in discrimination inconsistent with the principles of the Agreement.

With respect to existing measures, Canada has agreed to: (1) limit the application of its "surplus test" for energy exports to a monitoring function, with any possible future restriction subject to the proportionality and nondiscriminatory pricing conditions above; (2) eliminate its requirement that uranium exports be upgraded to the maximum extent possible in Canada prior to export; and (3) eliminate a discriminatory price test on electricity exports. The United States has agreed to: (1) eliminate the legislative restriction on enrichment of Canadian uranium; and (2) allow exports of Alaskan oil to Canada, up to 50 thousand barrels per day on an annual average basis, subject to a condition that such oil be transported from Alaska in U.S. flag vessels.

Both sides have agreed to: (1) support continuing Bonneville Power-B.C. Hydro negotiations, encouraging parties to work out their differences consistent with the objectives and principles of the Agreement; and (2) allow existing or future incentives for oil and gas exploration, development and related activities in order to maintain the reserve base for these energy resources.

4  
No. 87-645

Supreme Court, U.S.

FILED

NOV 18 1987

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

F. CLARK HUFFMAN, *et al.*,  
*Petitioners,*

v.

WESTERN NUCLEAR, INC., *et al.*,  
*Respondents.*

**On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit**

**BRIEF OF ELECTRIC UTILITY COMPANIES AS  
AMICI CURIAE IN SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI**

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November 1987



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IN THE  
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OCTOBER TERM, 1987

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v.

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On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

---

**BRIEF OF ELECTRIC UTILITY COMPANIES AS  
AMICI CURIAE IN SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI**

---

In accordance with this Court's Rule 36, the domestic  
electric utility companies (the "Utilities") listed below <sup>1</sup>

---

<sup>1</sup> The Utilities include:

Alabama Power Company  
Arkansas Power & Light Company  
Duke Power Company  
Georgia Power Company  
GPU Nuclear Corporation  
Houston Lighting & Power Company  
Kansas City Power & Light Company

[Continued]



have received the written consent of the parties to file this brief as *amici curiae*. Copies of the consents have been filed with the Clerk.

### INTRODUCTION

Section 161v of the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.* (1982 & Supp. III 1985), provides that the Atomic Energy Commission, now the Department of Energy ("DOE" or the "Department"):

*to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer [uranium enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.*

42 U.S.C. § 2201(v) (1982) ("section 2201(v)") (emphasis added). Section 170B requires the Secretary of DOE to submit an annual report on the viability of the domestic uranium mining and milling industry to the President and to the Congress. 42 U.S.C. § 2210b(a) (1982). On September 26, 1985, the Secretary of DOE issued a determination that the domestic uranium indus-

<sup>1</sup> [Continued]

Kansas Electric Power Cooperative, Incorporated  
 Kansas Gas and Electric Company  
 Louisiana Power & Light Company  
 MSU System Services, Incorporated  
 New York Power Authority  
 Philadelphia Electric Company  
 Public Service Electric & Gas Company  
 Southern California Edison Company  
 Southern Company Services, Incorporated  
 System Energy Resources, Incorporated  
 Texas Utilities Electric Company  
 Toledo Edison Company  
 Union Electric Company  
 Virginia Power  
 Wisconsin Electric Power Company  
 Wolf Creek Nuclear Operating Corporation

try was not viable in calendar year 1984. Memorandum for The President from DOE Secretary John S. Herrington (Sept. 26, 1985). Nevertheless, DOE did not impose enrichment restrictions on foreign-origin uranium under section 2201(v): the Department concluded that such restrictions would not assure the viability of the domestic industry, and, in that circumstance, enrichment restrictions were not required by statute. *See* 51 Fed. Reg. 3624, 3627 (1986).

The Respondent domestic uranium mining and milling companies in this case claim that section 2201(v) requires DOE to impose restrictions automatically upon a finding that the domestic industry is not viable. The District Court below agreed, and issued an injunction that would have required DOE to limit its enrichment of foreign uranium to 25% of all materials enriched between June 6, 1986 and December 31, 1986, and to refuse to enrich any foreign uranium after January 1, 1987. Petition at 23a. On appeal, the Tenth Circuit upheld the District Court's injunction. *Id.* at 21a.

### INTEREST OF THE *AMICI CURIAE* ELECTRIC UTILITY COMPANIES

The Utilities filing this brief as *amici curiae* will be vitally affected by the injunction. Each of the Utilities is licensed by the Nuclear Regulatory Commission to construct, own, or operate one or more nuclear reactors. Nuclear reactors depend for their operation on sufficient and timely supplies of enriched uranium. In this country, only DOE provides uranium enrichment services, and each of the Utilities currently has one or more contracts or options with DOE to have natural uranium enriched to become usable reactor fuel. DOE enrichment of foreign-origin uranium is expressly permitted by the criteria governing the terms and conditions under which the Department's enrichment services are made available. *See* 39 Fed. Reg. 38,016 (1974) (phasing out prior

restrictions on enrichment of foreign uranium). Accordingly, the Utilities, in reliance upon their enrichment contracts with DOE and the Department's ability to perform thereunder, have purchased or contracted to purchase hundreds of million dollars worth of foreign-origin uranium to meet their uranium enrichment obligations.

Unless this Court grants *certiorari* and reverses the decision below, the injunction will have severe repercussions for the Utilities and their customers. The injunction will abruptly and significantly frustrate the Utilities' commercial expectations. It will cause prices for natural uranium and enrichment services to rise, at home and abroad, just as the Utilities will be seeking to find alternative sources for both. Utilities that enter into alternative arrangements may still be saddled with their original contractual obligations. Some of the Utilities may not even be able to rearrange their supply and enrichment contracts in time to meet their immediate reactor refueling needs. In all cases, the consequential costs arising from the turmoil artificially induced by the injunction will be substantial, and such costs will be borne by the Utilities and their customers.

In contrast, there is no assurance whatsoever that the injunction will result in increased domestic production of uranium. Rather, it is more likely that there will be even less domestic production as DOE loses enrichment sales to its cheaper overseas competitors, and domestic utilities increase their reliance on both foreign uranium and foreign enrichment services. In short, the current plight of the domestic industry is not fairly traceable to uranium imports, but to long-term structural infirmities in the United States market. An injunction barring DOE enrichment of foreign uranium therefore could compound, not redress, the injuries alleged by Respondents.

The Utilities respectfully submit that this brief provides an important overview of the market disrup-

tions into which both the Utilities *and* the domestic industry will be plunged as a consequence of the injunction. Although the Utilities believe that the opinions of the District Court and the Tenth Circuit, issuing and upholding the injunction, respectively, are plainly mistaken as a matter of law, the Utilities are even more firmly convinced that the injunction will be simply disastrous as a practical matter.

### STATEMENT OF THE CASE

The Utilities adopt the Petitioners' Statement of the Case.

### REASONS FOR GRANTING THE WRIT

#### I. THE DISTRICT COURT'S INJUNCTION, AFFIRMED BY THE TENTH CIRCUIT, WILL HAVE IMMENSELY HARMFUL PRACTICAL CONSEQUENCES NOT OFFSET BY ANY SUBSTANTIAL BENEFIT TO RESPONDENTS.

##### A. The Injunction Will Cause The Utilities And Their Customers To Suffer Substantial Economic Penalties.

To leave in place the injunction affirmed by the Tenth Circuit will work a severe economic hardship on the Utilities and their customers. DOE's uranium enrichment criteria in effect at the time this lawsuit was initiated permitted the use of foreign-origin uranium to be phased in beginning in 1977. 39 Fed. Reg. at 38,016. Beginning in 1984, the criteria eliminated all restrictions on the enrichment of foreign uranium for domestic use. *Id.* at 38,017. The Utilities have relied on those criteria, and on their contracts with DOE that do not restrict the enrichment of imported uranium, to purchase, or contract for the purchase of, foreign uranium. As of January 1, 1985, U.S. utilities were estimated to hold contracts or options for natural uranium from foreign sources in 1985-1990 totaling 30.6 million pounds of  $U_3O_8$ —some \$780 million worth. See Affidavit of Loring E. Mills, filed



in *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1438 (10th Cir. 1987) (No. 86-1942) ("Mills Aff."), ¶ 3, reprinted as Appendix A hereto; Petition at 24 n.18.

Under the injunction, the Utilities will be unable to have the uranium they purchased or contracted to purchase abroad enriched pursuant to their contracts with DOE. The Utilities' obligations to their customers, however, will require them to take all necessary steps to obtain enough enriched uranium to continue operating their nuclear plants. Yet any of the alternatives the Utilities are forced to select in these circumstances "will result in significant adverse consequences in terms of increased costs and market disruption." Mills Aff. ¶ 6.

Utilities with foreign uranium under contract may elect to walk away from their DOE enrichment contracts and arrange for foreign enrichment services. This increased demand for foreign enrichment will drive up the price of such services. Moreover, as fewer utilities bring uranium to DOE for enrichment, DOE will have to raise the price of enrichment services to its remaining customers in order to comply with its statutory requirement to recover its costs. Mills Aff. ¶ 6(a); see 42 U.S.C. § 2201(v). Utilities with foreign uranium already on hand may attempt to purchase stockpiled domestic uranium from other utilities to enrich under their contracts with DOE. Such uranium will be hard to obtain as utilities hoard their supplies for the future, and it will command a premium when it is available. Mills Aff. ¶ 6(b). Finally, some utilities may seek to purchase newly-produced domestic uranium. The domestic industry, however, is not geared up to produce the amount of uranium that will be required. Rather, domestic producers are already importing foreign uranium for resale to U.S. utilities, because it is more economical than mining and milling additional quantities in this country. See 51 Fed. Reg. 27,132, 27,135 (1986). The domestic producers will certainly raise the price of any additional uranium they

do produce in order to cover their higher marginal costs—and to take advantage of the surge in demand created by the injunction. See Mills Aff. ¶ 6(c).

Any of these choices will take time to implement. Yet the injunction will take effect immediately, barring DOE from accepting foreign uranium for enrichment. "U.S. utilities with foreign uranium under contract and reactor refueling scheduled during the next 18 months may be unable to rearrange their contracts in time to meet their needs." Mills Aff. ¶ 7. At the same time, the domestic uranium industry presently lacks the production capacity to respond to the new fuel requirements of all operating domestic nuclear plants. *Id.* ¶ 9. For both reasons, some U.S. utilities could be forced to shut down temporarily and purchase or generate more costly replacement power. *Id.* ¶¶ 7, 9.

Thus, it is inevitable that the Utilities, pursuing any of the options available to them if the injunction takes effect, will end up with "duplicative, overlapping, or conflicting contracts for uranium supplies or enrichment services or both." Mills Aff. ¶ 10. Lengthy and expensive litigation over a host of contractual issues is sure to follow. See *id.* Furthermore, "[u]nder traditional principles of electricity rate regulation, the increased uranium costs, the increased price for enrichment services, and the costs of abrogating existing contracts will all be incorporated in electric rates and ultimately would be borne by the consumers of electricity." *Id.* ¶ 12.

These increased costs, which may be crippling in varying degrees to the Utilities and their customers throughout the country, are wholly unnecessary. This Court can prevent them by granting *certiorari* and reversing the decision below.



### B. The Injunction Will Not Assure The Viability Of The Domestic Uranium Industry.

As the Petitioners have set forth in detail, *see* Petition at 4-12, the plight of the domestic uranium industry in the mid-1980's is the product of 40 years of legal, political, and commercial developments. The primary causes of the depressed U.S. uranium market are the unanticipated decline in the demand for nuclear power, the cancellation of power plants, the failure of domestic mining and milling companies to decrease uranium production in response to the decrease in consumption, the build-up of utility inventories of natural and enriched uranium, and the emergence of secondary and foreign markets for both natural and enriched uranium.

Imports of foreign uranium have *not* been the major cause of the domestic industry's financial problems. No less an expert on trade matters than the United States Trade Representative has so determined, in response to a request by the Secretary of DOE to investigate the advisability of initiating a legal action to restrict uranium imports pursuant to section 2210b(d).<sup>2</sup> The Trade Representative counseled against such an action, based on his conclusion that the economic difficulties experienced by the domestic industry are the result of long-term market forces and cannot be alleviated by restricting DOE's enrichment of foreign uranium. Letter from U.S. Trade Representative Clayton Yeutter to DOE Secretary John S. Herrington (Dec. 26, 1985).<sup>3</sup>

<sup>2</sup> The statute authorizes the Secretary to determine whether uranium imports constitute "a substantial cause of serious injury, or threat thereof," to the domestic industry. 42 U.S.C. § 2210b(d) (1982). By requesting the Trade Representative to conduct a preliminary injury determination, the Secretary fully discharged his responsibilities in these circumstances. *See* 51 Fed. Reg. at 27,135.

<sup>3</sup> The Trade Representative's conclusion, of course, is the product of expert judgment which carries a presumption of validity. *Cf. FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944);

Although foreign-origin uranium has captured an increasing share of the domestic market over the past few years, this trend has been a symptom, rather than a cause, of the weaknesses of the U.S. uranium industry. The serious decline of the domestic uranium industry was evident as early as 1981, yet as of 1981 less than ten percent of the uranium delivered to DOE for enrichment was of foreign origin. *See Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports, Hearing Before the Subcomm. on Energy Research and Development of the S. Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 1-21, 41-45, 120-123 (1981). Further, more than 37% of the foreign-origin uranium under contract for delivery to the United States between 1985 and 1990 has been contracted for by domestic uranium producers who have chosen to purchase uranium abroad for resale instead of producing it themselves. 51 Fed. Reg. at 27,135. This outsourcing, as well as the increase in uranium imports generally, is attributable to the simple fact that higher grade ore and lower production costs make it possible to buy foreign uranium for less than what it costs to produce domestic uranium. *Id.*

In these circumstances, requiring DOE to restrict its enrichment services for foreign-origin uranium will not address the fundamental, long-term weaknesses of the domestic industry. In fact, as the Department confirmed during its recent rulemaking on revised enrichment criteria,<sup>4</sup> restrictions on the enrichment of imported ura-

*Puerto Rico Maritime Shipping Authority v. FMC*, 678 F.2d 327, 335 (D.C. Cir.), *cert. denied*, 459 U.S. 906 (1982).

<sup>4</sup> Subsequent to the initiation of this lawsuit, DOE commenced a rulemaking to revise the enrichment criteria in response to market changes and the depressed condition of the domestic industry. 51 Fed. Reg. at 3625. Nevertheless, no restrictions on the enrichment of foreign uranium were included in the final revised criteria adopted by the Department, based on the Secretary's conclusion that "restrictions would [not] assure the viability of the domestic mining and milling industry." 51 Fed. Reg. at 27,135. *See* Petition at 11-13, 13 n.10.

mium "could further damage the U.S. mining industry," 51 Fed. Reg. at 3627, and thus would be "counterproductive." 51 Fed. Reg. 15,632 (1986). If such restrictions take effect under the injunction, DOE's enrichment services will become less competitive in the world market. That, in turn, will trigger a loss of enrichment sales by DOE, and the viability of the domestic mining industry will be jeopardized all the more.

Even in the short term, an injunction against the enrichment of foreign uranium will hardly benefit the domestic industry. As previously discussed, *see supra*, pp. 6-7, an injunction will not result in an immediate increase in domestic uranium production: The domestic mining and milling companies lack the present capacity to respond to a sudden increase in demand. Instead, U.S. utilities will turn to foreign enrichment or purchase stockpiled domestic uranium to meet their consumption requirements. Furthermore, those domestic producers who have purchased foreign-origin uranium for resale in this country may be just as adversely affected as their utility company customers by an injunction barring DOE enrichment of such imports.

## II. THE INJUNCTION REPRESENTS AN IMPROPER JUDICIAL INTRUSION INTO AGENCY RULE-MAKING.

The decisions below repudiate the deference properly due to a reasonable statutory interpretation by the agency charged with administering the law. Further, the injunction issued by the District Court and affirmed by the Tenth Circuit is the product of unlawful judicial rule-making that undermines the division of power inherent in the Constitution and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1982). This Court should grant *certiorari* in order to restore that balance of power and to vindicate the principle that federal appellate review is intended to scrutinize, but not substitute for, agency decision-making.

### A. The Decisions Below Contravene The Standard This Court Has Set For Review Of Agency Decisions.

This case is governed by well-settled principles of statutory construction and appellate review of agency decisions: the plain meaning of a statute must be enforced, and if it is ambiguous, a permissible construction by the agency entrusted to administer the law is entitled to "considerable weight." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-845 (1984). *Accord American Paper Institute v. American Electric Power Service*, 461 U.S. 402, 423 (1983); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. International Union of Electrical Workers*, 367 U.S. 396, 408 (1961). Even if the meaning is not plain, however, a court may not substitute its own interpretation for that issued by an agency merely because there are several plausible ways to view the statute's meaning. *Chevron U.S.A.*, 467 U.S. at 843 & n.11. Rather, so long as the agency has reasonably sought to implement the statute in a manner that Congress has not proscribed, its interpretation must be upheld. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Chevron U.S.A.*, 467 U.S. at 843-845 & nn.11-14; *Batterton v. Francis*, 432 U.S. 416, 426 (1977).

The plain meaning of section 2201(v) is that restrictions on enrichment of foreign-origin uranium are required only when they are necessary to maintain a viable domestic uranium industry. If the industry will not benefit from the restrictions, they can hardly be necessary. That is precisely how the Department analyzed section 2201(v):

The plain language of the statute makes clear the restrictions are not to be imposed for their own sake. Rather, DOE has a duty to determine whether their imposition would achieve the statutory objective of assuring the viability of the domestic industry. And,



when DOE determines imposition would have a meaningless or counterproductive effect on this objective, DOE should not, and indeed, cannot impose restrictions.

51 Fed. Reg. at 15,632. Any other interpretation of the statutory language—for example, to require DOE to restrict the enrichment of imported uranium when such action would *not* help the domestic uranium industry—is absurd and could not have been intended by Congress. See *Alabama Power Co. v. Costle*, 636 F.2d 323, 392 n.158 (D.C. Cir. 1979) (opinion of Robinson, J.) (absurd construction of a regulatory statute is to be avoided if at all possible); *New York State Commission on Cable Television v. FCC*, 571 F.2d 95, 98 (2d Cir.) (“The appropriate methodology, then, is to look to the ‘common sense’ of the statute or regulation, to its purpose, to the practical consequences of the suggested interpretations, and to the agency’s own interpretation for what light each inquiry might shed”), *cert. denied*, 439 U.S. 820 (1978).

Thus, the failure of the courts below to sustain DOE’s construction of section 2201(v) and DOE’s well-considered decision not to issue criteria barring the enrichment of foreign uranium constitutes clear legal error. See *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986) (upholding agency’s statutory construction and decision not to promulgate regulations).

#### **B. The Decisions Below Arrogate The Roles Congress Intended Both For The Department Of Energy And Itself.**

Section 2201(v) requires DOE to establish written criteria setting forth the extent to which the Department’s enrichment services will be made available for imported uranium. Further, it requires DOE to submit its proposed criteria to Congress for a 45-day review period before they can take effect. Thus, even if a court

ruled that DOE interpreted section 2201(v) incorrectly, the only proper remedy would be for that court to order the Department to issue criteria specifying the extent to which new restrictions on enrichment of foreign uranium would apply. Cf. *Burlington Northern Inc. v. United States*, 459 U.S. 131, 141 (1982) (“federal-court authority to reject [Interstate Commerce] Commission rate orders for whatever reason extends to the orders alone, and not to the rates themselves”); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 545 (D.C. Cir. 1983) (to vacate an agency’s new rule without reinstating the old rule “avoids any problem of the [appellate] court overstepping its authority, and leaves it to the agency to craft the best replacement for its own rule”). Instead, by enjoining DOE to impose specific limits on its enrichment of foreign uranium, the courts below not only have ousted the Department of its primary jurisdiction over the promulgation of enrichment criteria, but they also have deprived Congress of its role in scrutinizing and approving the criteria. Such actions constitute unlawful judicial rulemaking, which this Court should not leave unreviewed.

At the time Respondents initiated this lawsuit, the Department’s existing criteria had phased out all restrictions on DOE enrichment of foreign uranium as of January 1, 1984. See 39 Fed. Reg. at 38,017; 38 Fed. Reg. 12,180 (1973). Having failed to seek judicial review of the criteria when they were adopted, Respondents may not do so now—directly, or collaterally by seeking an injunction to prevent the enrichment of foreign uranium. See *Baylor University Medical Center v. Heckler*, 758 F.2d 1052, 1058 (5th Cir. 1985); *Independent Bankers Association v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980); *Nader v. NRC*, 513 F.2d 1045, 1054-55 (D.C. Cir. 1975).

More importantly, the District Court’s willingness to issue such an injunction and the Tenth Circuit’s willing-



ness to affirm it represent improper judicial encroachments into administrative rulemaking. The injunction effectively substitutes the judiciary's own enrichment criteria for those lawfully issued by DOE. "Such usurpation of administrative power . . . ill serve[s] the orderly operation of the federal government. Nor [does] such action pay proper respect to the division of power inherent in the Constitution and the Administrative Procedure Act, . . . ." *Colorado Public Interest Research Group v. Hills*, 420 F. Supp. 582, 586 (D. Colo. 1976). Cf. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 557 (1978) (condemning "judicial intervention run riot").

For the same reason, the injunction too readily deprives the Department of its primary jurisdiction over the issuance of enrichment criteria, even where the courts found fault with the absence of new criteria restricting enrichment of foreign uranium. The courts, while retaining the final authority to expound a statute, are required to avail themselves of the aid implicit in the agency's superior expertise concerning the subject matter in question. See *Conrail v. National Association of Recycling Industries*, 449 U.S. 609, 612 (1981); *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973). The authority to promulgate uranium enrichment services criteria was delegated by Congress, with good reason, to DOE, not to a federal court.

Section 2201(v) contains the 45-day review period requirement to ensure that any uranium enrichment criteria proposed by DOE become "subject to Congressional scrutiny." S. Rep. No. 1325, 88th Cong., 2d Sess. 16, reprinted in 1984 U.S. Code Cong. & Admin. News 3105, 3120. By changing the effective enrichment criteria immediately, the injunction circumvents the process of scrutiny and approval that Congress expressly reserved for itself.

## CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the writ of *certiorari* should be granted.

Respectfully submitted,

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November 1987

## **APPENDIX**

1a

APPENDIX A

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH DISTRICT

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No. 86-1942

---

WESTERN NUCLEAR, INC., et al.,  
*Plaintiffs-Appellees,*

v.

F. CLARK HUFFMAN, et al.,  
*Defendants-Appellants.*

---

AFFIDAVIT IN SUPPORT OF STAY  
PENDING APPEAL

---

DISTRICT OF COLUMBIA ) ss.-

LORING E. MILLS, being duly sworn, says:

1. I am Vice President, Nuclear Activities of Edison Electric Institute ("EEI"). I make this affidavit in support of the motion filed by appellants for a stay pending appeal of the injunction contained in the order issued by District Judge Carrigan on June 20, 1986.

2. EEI is the national association of the nation's investor-owned electric companies, with offices at 1111 19th Street, N.W., Washington, D.C., 20036. EEI's mem-



bers serve approximately 73 percent of all electricity customers in the nation. They operate 85 nuclear plants and currently have 16 additional units under construction. These nuclear utilities are the majority of the domestic uranium enrichment customers of the Department of Energy ("DOE"). Part of my job with EEI is to gather and review data and information concerning the supply of, and demand for, natural uranium and enrichment services by U.S. utilities that own and operate nuclear power plants. Such data and information are available to EEI from individual nuclear utilities or obtained from publicly-available sources, including defendant-appellant DOE.

3. The estimated total of existing contracts or options held by U.S. utilities and U.S. uranium suppliers for natural uranium from foreign sources as of January 1, 1985 was as follows:

Year	U.S. Utility Contracts With Foreign Producers	U.S. Uranium Supplier Contracts For Foreign Uranium	Total Amount From Foreign Producers (Million Pounds U <sub>3</sub> O <sub>8</sub> )
1985	5.4	4.5	9.9
1986	5.4	2.8	8.2
1987	4.9	4.0	8.9
1988	4.9	2.4	7.3
1989	4.5	2.4	6.9
1990	5.5	2.1	7.6

Source: Energy Information Administration, *Domestic Uranium Mining and Milling Industry: 1984 Viability Assessment*, DOE/EIA-0477 ("1984 EIA Report") at p. 11, Table I.

In addition, at year-end 1984 there were approximately 29.2 million pounds U<sub>3</sub>O<sub>8</sub> equivalent of foreign unenriched uranium in process in the United States. Energy Information Administration, *Uranium Industry Annual 1984*, DOE/EIA-0478(84) at p. 82, Table 42. Data for calendar year 1985 have not yet been published.

4. It is important to note that over 37 percent of the foreign uranium under contract for 1985-90 delivery was contracted for by domestic suppliers. Those suppliers, several of which hold domestic uranium reserves, choose to acquire uranium abroad and sell it to the U.S. utilities rather than produce uranium from their domestic reserves to meet the utilities' requirements. It is clearly unfair to have an injunction that will require the utilities to renegotiate their uranium supply contracts, at premium prices, for domestic uranium with the same domestic producers who elected to deliver foreign uranium to begin with, instead of producing domestic uranium.

5. Certain U.S. nuclear utilities also have contracts for the enrichment of uranium outside the United States. However, most U.S. utilities have chosen to rely on DOE for enrichment services. As a result of a free world surplus of capacity for uranium enrichment, it is estimated that there is presently available uncommitted foreign enrichment capacity of approximately 5,000,000 separation work units ("SWUs") per year, enough to enrich all the foreign origin uranium now under contract or option to U.S. utilities.

6. If this Court does not stay the injunction pending appeal, U.S. nuclear utilities will be forced to choose among several unattractive options to ensure a sufficient amount of enriched uranium to continue operation of their nuclear plants. Pursuing any of these options, or a combination, will result in significant adverse consequences in terms of increased costs and market disruption. The options that U.S. utilities are likely to pursue include:

a. Utilities with foreign uranium under contract will consider seeking foreign enrichment services and may choose to do so for all or only a part of their foreign uranium, abrogating their existing enrichment contracts

with DOE. While the price of foreign enrichment services is currently competitive with DOE, a sudden surge of demand can reasonably be expected to result in increased prices for overseas enrichment. The corresponding loss by DOE of enrichment volumes will result in an increase in the price of domestic enrichment as well, because of the statutory requirement for recovery of costs by DOE.

b. Utilities with foreign uranium that are obligated to receive enrichment services under their DOE contracts will be forced to try to purchase domestic uranium that is currently stockpiled by others to substitute for their foreign uranium. However, the domestic uranium that is stockpiled by U.S. utilities probably will not be made available to utilities in need because the injunction will cause utilities with an ample supply of domestic uranium to keep it for their own future needs. If sufficient domestic uranium can be obtained, the result will be redundant purchases of uranium that will cause a serious cash flow problem for those utilities that are forced both to honor their contracts for foreign uranium and to purchase supplies of domestic uranium. This will be exacerbated by the sudden increase in demand for domestic uranium, resulting in higher prices than would be expected in a normal market with supply and demand at or near equilibrium.

c. Utilities could attempt to purchase newly-produced domestic uranium, but they will find that the present U.S. producing capacity is severely restricted in the short run. As shown in paragraphs 3 and 4, many U.S. producers are importing supplies of foreign uranium for resale to U.S. utilities for domestic end use. Any amounts that could be produced above already-contracted capacity would undoubtedly command a premium price.

7. Pursuing one or more of the foregoing options will take time. Because the injunction is immediately effective, U.S. utilities with foreign uranium under contract

and reactor refueling scheduled during the next 18 months may be unable to rearrange their contracts in time to meet their needs. Such utilities would be forced to shut down temporarily and purchase or generate more costly replacement power.

8. It must be remembered that a utility cannot simply purchase natural uranium as  $U_3O_8$  and deliver it to DOE for enrichment. The uranium must first be converted to uranium hexafluoride ( $UF_6$ ). A major conversion facility, the Sequoyah plant owned by Kerr-McGee, is currently shut down because of an accident, and the restart of the plant has been delayed by the Nuclear Regulatory Commission for an indeterminate period. Those utilities that have foreign uranium which has already been converted to  $UF_6$  and is ready for delivery to DOE will be required by the injunction to purchase domestic  $U_3O_8$  and contract for its conversion to  $UF_6$ . This will create a backlog at the one remaining conversion facility that is operating in the United States, delaying delivery of  $UF_6$  to DOE. Meanwhile, the already converted  $UF_6$  will be stockpiled, unavailable for use, and the utilities will be required to pay twice for the needed conversion service.

9. There is considerable doubt that the fuel requirements of all of the operating nuclear plants can be physically achieved under the injunction, because of the lack of currently available production and conversion capacity. This also could result in utilities being forced to shut down temporarily and rely upon more expensive replacement power.

10. Action by U.S. utilities to pursue one or more of the options previously discussed will necessarily result in most utilities winding up with duplicative, overlapping, or conflicting contracts for uranium supplies or enrichment services or both. Utilities presumably will take the position that certain contracts are void because of the injunction or that the orders of the District Court con-

stitute *force majeure* relieving them of their obligations. Such claims may or may not be accepted by suppliers. Either lengthy and expensive litigation or the payment of termination charges or damage claim settlements will likely be required to resolve the status of the contracts.

11. The additional costs to the utilities resulting from efforts to secure alternate and in some cases duplicative sources of supply, and to obtain a legal determination of their obligations under their previous contracts, obviously cannot be quantified ahead of time. The distribution of costs will vary significantly, depending upon the contractual status of a particular utility. Utilities that are committed to foreign sources of uranium supply can expect to experience sharply increased costs either as a result of increased foreign enrichment prices or, if they continue to seek enrichment services from DOE, as a result of the cost of purchasing domestic uranium supplies, most likely at an inflated price. Moreover, as fewer utilities seek enrichment services from DOE, DOE will be forced to increase the price of enrichment services to its remaining customers to meet its congressionally-mandated obligation to recover appropriate Government costs.

12. Under traditional principles of electricity rate regulation, the increased uranium costs, the increased prices for enrichment services, and the costs of abrogating existing contracts will all be incorporated in electric rates and ultimately would be borne by the consumers of electricity.

13. In summary, if the injunction is not stayed pending appeal, there will be an immediate, severe disruption in the cost and availability of enriched uranium needed to produce electricity. The costs will be millions of dollars in the next few months and could be several hundred millions of dollars within the next few years. The dollar costs, direct and indirect, will be borne by the U.S. utili-

ties and the electric ratepayers. If the District Court's injunction is later reversed on appeal, the utilities will have no way to recover those costs. The harm that will be caused by the injunction is truly irreparable.

/s/Loring E. Mills  
LORING E. MILLS

Sworn to before me  
on July 10, 1986

/s/ Michael J. Tobin  
Notary Public



(5)  
No. 87-645

Supreme Court, U.S.

FILED

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JOSEPH E. SPANIOLO, JR.,  
CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

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F. CLARK HUFFMAN, *et al.*,

*Petitioners,*

v.

WESTERN NUCLEAR, INC., *et al.*,

*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit**

---

**BRIEF OF AMICI CURIAE STATES  
IN OPPOSITION TO  
PETITION FOR CERTIORARI**

---

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### Question Presented

The Amici Curiae States of Wyoming, New Mexico, Colorado, Utah, Arizona and Nevada disagree with the question framed by the Government in its Petition for Certiorari.

Both uranium and enrichment services are necessary to produce nuclear fuel for nuclear power reactors and military applications. The provision of enrichment services is a government monopoly worldwide, and the Department of Energy (DOE) is the sole domestic enricher in the United States. DOE enrichment policies thus have had, and continue to have, a profound impact on the health of the domestic uranium industry.

Under section 161v. of the Atomic Energy Act, 42 U.S.C. 2201v., the federal Government "shall" establish written terms and conditions for the provision of enrichment services, "shall" include in those terms and conditions the conditions governing enrichment of foreign-source uranium for domestic end-use, and "shall not offer" enrichment services for foreign-source uranium for domestic end-use "to the extent necessary to assure the maintenance of a viable domestic uranium industry." The Government possesses supplementary authority under, *inter alia*, sections 161b. and p. of the Atomic Energy Act, 42 U.S.C. 2201b. & p., to limit importation of uranium or enriched uranium for domestic end-use.

The federal Government admits that the domestic uranium industry is in fact "non-viable." Yet it has done nothing even remotely effective to restore, much less maintain, the domestic industry's viability. The question presented in this case is whether the Gov-



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

F. CLARK HUFFMAN, <i>et al.</i> <i>Petitioners,</i>	)	
	)	
v.	)	
WESTERN NUCLEAR, INC., <i>et al.,</i> <i>Respondents.</i>	)	No. 87-645

**Brief of Amici Curiae States in  
Opposition to Petition for Certiorari**

Amici Curiae States of Wyoming, New Mexico, Utah, Colorado, Nevada, and Arizona hereby oppose the petition for certiorari filed on behalf of Petitioners Huffman, et al. (hereinafter referred to collectively as the "Department of Energy" or DOE"). The petition for certiorari is directed against an injunction, issued by the United States District Court for the District of Colorado, and unanimously affirmed by the United States Court of Appeals for the Tenth Circuit, requiring DOE to halt enrichment of foreign-source uranium for domestic end-use as required by section 161v. of the Atomic Energy Act ("AEA") 42 U.S.C. 2201v., pending a rulemaking.

The unanimous rulings below present no conflict in the circuits, nor does the result reached by the courts below raise questions of sufficient significance to warrant review by this Court. The government's petition for certiorari should accordingly be denied.



## I. INTEREST OF AMICI

As the Amici States have indicated in papers filed in the proceedings below, the end sought by the Department of Energy in the instant Petition, namely, continued avoidance of discharging its obligation to assure the maintenance of a viable domestic uranium industry, is causing, and will continue to cause, serious harm to the economies of the Amici States. DOE's actions, or more appropriately, inactions, are also resulting in severe harm to many local communities as well as to the citizens of the Amici States which have relied upon the domestic uranium industry for employment opportunities and tax revenues. Section 161v. represents a commitment to uranium-producing States that they could safely invest in the infrastructure necessary to support an important mineral industry because the federal government would assure that the industry was not in general subject to the boom and bust cycle which so often afflicts other extractive industries. While the commitment may be subject to revision by Congress, it is not subject to the whim of unelected officials in charge of DOE's enrichment program.

## II. STATEMENT OF FACTS

### A. Nuclear Fuel

Nuclear fuel used in civilian nuclear power reactors in the United States and most of the rest of the world is comprised of two basic inputs: natural uranium (called, in the terminology of the Atomic Energy Act, "source material"<sup>1</sup>) and enrichment services. Enrichment services are employed to raise the proportion of fissionable isotope Uranium-235 to about 3% from the normal proportion of about 0.7% which occurs in nature. The provision of enrichment services is a government monopoly worldwide. In the United States, the sole domestic enricher is the United States Department of Energy ("DOE"), which, like

<sup>1</sup> 42 U.S.C. 2014(z).

the Nuclear Regulatory Commission ("NRC"), is a successor agency to the old Atomic Energy Commission ("AEC").<sup>2</sup>

### B. The Interconnection between Uranium and Enrichment and the Adoption of Section 161v. of the Atomic Energy Act.

Since uranium and enrichment services can be combined in different ways to produce a given quantity of nuclear fuel (called enriched uranium, or, in the terminology of the AEA "special nuclear material"<sup>3</sup>), the policies of the government with respect to the provision of enrichment services can and do have a profound impact on the demand for natural uranium, which in the United States is privately supplied.<sup>4</sup> Originally the government was the sole lawful owner of nuclear fuel in the United States.<sup>5</sup> When private ownership of nuclear fuel was authorized in 1964,<sup>6</sup> Congress was concerned that federal enrichment policies not whipsaw the private uranium industry, and that the Nation's private uranium industry be maintained in a viable condition in order to assure our energy independence and national security with respect both to nuclear fuel and

<sup>2</sup> Under the Energy Reorganization Act of 1974, P.L. 93-438, 88 Stat. 1233, the AEC was abolished and its atomic energy regulatory functions were transferred to the Nuclear Regulatory Commission, while its enrichment activities were transferred to the Energy Research and Development Administration (ERDA). 42 U.S.C. 5813 & 5814(c). ERDA was abolished and its functions transferred to DOE by the DOE Organization Act of 1977. 42 U.S.C. 7151(a).

<sup>3</sup> 42 U.S.C. 2014(aa).

<sup>4</sup> See, e.g., *Proceedings of the Tri-Committee Business Advisory Panel on Uranium Enrichment*, House Energy and Commerce Comm. Serial No. 98-160, 98th Cong., 2d Sess. at 38-39 (1984) (DOE witness notes the significant interchangeability of enrichment and natural uranium by analogy to a cider press).

<sup>5</sup> See section 52 of the AEA of 1954, 68 Stat. 929-30 (repealed).

<sup>6</sup> P.L. 88-489, 78 Stat. 702.

to fissionable material.<sup>7</sup> Congress accordingly adopted section 161v. of the AEA, 42 U.S.C. 2201v. That section provides, among other things, that the AEC (now the DOE) must adopt written "criteria" governing the provision of enrichment services and that the agency must limit enrichment of foreign source uranium for domestic end-use to the extent necessary to "assure the maintenance of a viable domestic uranium industry."<sup>8</sup>

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<sup>7</sup> Congress specifically observed that "[t]he maintenance of a domestic uranium mining and milling industry is an essential part of a sound nuclear industry and is also vital" to national security interests. 1964 U.S. Code Cong. & Admin. News 3115 & 3135. In responses to questions propounded by a House Committee, DOE more recently admitted that the domestic uranium industry continues to have national security significance:

"Q.9 Why is a viable uranium industry vital to the interests of our nation?

Answer: The domestic uranium industry implicates the vital interests of our Nation because a significant fraction of the Nation's electricity is generated by nuclear power and our strategic defense has a major nuclear component. Congress recognized the strategic importance of this industry in the Atomic Energy Act of 1954.

*Domestic Uranium Mining Industry, Hearings before the Energy Cons. & Power Subcomm. of the House Energy & Comm. Comm., 99th Cong., 1st Sess., at 66 (1985).*

<sup>8</sup> Section 161v. provides in pertinent part as follows: "the Commission [now DOE], to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials [uranium] of foreign origin intended for use in a utilization facility [nuclear power reactor] within or under the jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. . . ."

### C. The Non-Viable Condition of the Domestic Uranium Industry.

The domestic uranium industry is currently in a non-viable condition. Although demand for nuclear fuel is at an all-time high, U.S. production has plummeted to levels prevailing in the 1950's. Employment has dropped from roughly 20,000 to about 2000 nation-wide. Capital investment in the industry has nose-dived. Exploration has all but ceased. Many communities dependent on the industry have been devastated.<sup>9</sup>

DOE initially declined to take action under section 161v. on the ground that the domestic uranium industry was viable and that its viability was assured.<sup>10</sup> DOE continued to maintain this position until September of 1985—over nine months after it had been sued in this proceeding—when the agency finally issued a formal determination that the industry was in fact "non-viable" in calendar year 1984. On September 24, 1986, DOE issued a formal determination that the industry was in fact "non-viable" in calendar year 1985. Conditions within the domestic uranium industry have not improved in 1986 or 1987. Employment and production remain largely stagnant at levels which represent a small fraction of those at the beginning of the decade. No turn-around is in sight. Indeed, the October 28, 1987 issue of the Wall Street Journal reports

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<sup>9</sup> See, e.g., *Hearing before the Energy & Power Subcomm. of the House Energy and Comm. Comm., 100th Cong., 1st Sess. (April 8, 1987) (testimony of Edward Farley).*

<sup>10</sup> The Wall Street Journal caricatured DOE's position in a front page story contesting that representation, focussing on the devastating decline of the industry in Grants, New Mexico, and throughout the western mining districts. DOE references this story in its certiorari petition at p. 6 (Blundell, U.S. Uranium Mines, Thriving 5 Years Ago, Are Nearing Extinction).

on p. 1 that "the uranium industry is near death" and on p. 20 that it is "near collapse."<sup>11</sup>

#### D. DOE's Unlawful Failure to Act.

Despite the fact that the domestic uranium industry is now the most depressed of all U.S. mineral industries, despite the fact that DOE has admitted that the U.S. is rapidly headed toward indefinite and substantial dependence on foreign sources of supply,<sup>12</sup> and despite the fact that DOE now admits that the domestic uranium industry is clearly "non-viable," the agency has refused to limit enrichment of foreign-source uranium for domestic end-use as required under section 161v. of the AEA, 42 U.S.C. 2201v. Moreover, DOE has failed to take any other actions to alleviate the industry's distress<sup>13</sup> and has made it crystal clear that it will not implement enrichment limitations under section 161v. unless compelled to do so by the court.

DOE's latest grounds for refusing to act, which grounds were first pressed *after* the district court had issued the

<sup>11</sup> "Western Gloom: Resources-Rich Basin Finds Its Treasures Don't Bring Prosperity," *Wall St. J.*, October 28, 1987.

<sup>12</sup> See, e.g., DOE Energy Information Administration, Domestic Uranium Mining and Milling Industry, 1984 Viability Assessment (approx. 60 % U.S. dependence on foreign uranium).

<sup>13</sup> In its Petition for Certiorari, the Government suggests that DOE has taken two actions to benefit domestic producers. Cert. Pet. at 8, citing some 1981 Hearings. The two alleged actions were a decision to continue to promote nuclear power and a decision not to distribute uranium from the government stockpile. Neither of these actions benefits domestic uranium producers over foreign producers; neither is adequate to assure domestic industry viability (as witnessed by DOE's acknowledgement that the industry subsequently became non-viable); and DOE in fact is distributing or planning to distribute uranium from the stockpile. See *Domestic Uranium Mining Industry*, *supra* note 7, at 117 (1985) (planned below-market stockpile distributions documented in DOE documents).

injunction at issue here,<sup>14</sup> are that limiting enrichment of foreign source uranium for domestic end-use would be ineffective in assisting the domestic uranium industry. As the *Wall Street Journal*, which DOE cites in its Petition for Certiorari, indicates, a reason for the collapse of the domestic uranium industry is "bonanza lodes discovered in Canada and elsewhere."<sup>15</sup> DOE projects a U.S. dependency on foreign-source uranium of at least 60%. Obviously if this market were available for domestic producers, there would be much more production, and a restored industry.<sup>16</sup> The efficacy of an enrichment limitation is further corroborated by the strong opposition of Canada and Australia to DOE implementation of section 161v.<sup>17</sup>

#### E. This Litigation.

Faced with DOE's recalcitrance, three domestic uranium producers on December 7, 1984, filed a multi-count complaint in United States District Court for the District of

<sup>14</sup> DOE first raised this ground in the stay request which it filed with the U.S. Court of Appeals. So far as Amici States can tell, all the citations in the agency's certiorari petition to alleged "findings" (actually, simply conclusory statements by DOE) in support of this ground are not part of the record before the district court on the cross-motions for summary judgment from which this appeal arises. In fact, most of the conclusory statements derive from a rulemaking subsequently conducted by DOE to adopt new enrichment criteria in an effort to moot a challenge to the agency's generic enrichment contracts. The conclusory statements emanating from the rulemaking are themselves unsupported in the rulemaking record. DOE's reliance on such statements in the Petition for Certiorari is blatant bootstrapping. Moreover, Duke Power Company has sued the agency to invalidate the new enrichment criteria on a variety of grounds. See *Duke Power Company v. DOE*, 830 F.2d 359 (D.C. Cir. 1987).

<sup>15</sup> *Western Gloom*, *supra* note 11, at 20.

<sup>16</sup> See Hearings, *supra* note 9.

<sup>17</sup> DOE references this opposition in its Cert. Pet. at 26 n.21. DOE was even more adamant in its Motion for Stay in Tenth Circuit, at 12 (noting that Canada states that the limitation "will severely disrupt Canadian exports").



Colorado for enforcement of section 161v. Insofar as is relevant here, the district court on cross-motions for summary judgment granted summary judgment to the three producers and against DOE on Count I of the Complaint. After inviting the parties to confer on the terms of an order, the district court on June 20, 1986, issued an order enjoining the Department of Energy from enriching foreign source uranium for domestic end-use in amounts greater than 25% through December of 1986, and barred such enrichment after January 1, 1987, pending a rule-making to adopt other or alternative measures sufficient to maintain a viable domestic uranium industry. Rather than finally implement section 161v., DOE appealed to the United States Court of Appeals for the Tenth Circuit. On July 20, 1987, the court of appeals issued its decision affirming the district court's order.<sup>18</sup> The agency responded with a petition to this Court.

### III. SUMMARY OF ARGUMENT

Section 161v. of the AEA imposes a mandatory duty on the Department of Energy to limit enrichment of foreign source uranium to the extent necessary to assure the maintenance of a viable domestic uranium industry. DOE admits that the domestic uranium industry is non-viable. The agency has plainly failed to limit enrichment of foreign

<sup>18</sup> The district court, in response to Count II of the Complaint below, had also declared DOE's generic uranium enrichment contract null and void as inconsistent with then-existent uranium enrichment criteria. The Court of Appeals vacated this portion of the district court's judgment and remanded for a determination of standing on the part of the producers to contest the contract. The Court of Appeals rejected DOE's argument that the dispute over the contract was moot in view of revisions to the enrichment criteria, noting that the producers had raised substantive issues concerning the contract as well as procedural complaints. For more information on these legal issues, see Montange, *The Federal Uranium Enrichment Program and the Criteria and Full Cost Recovery Requirements of Section 161 of the Atomic Energy Act*, 2 J. Mineral L. & Policy 1 (1986-87).

source uranium as required by statute, or to do anything else that is sufficient to assure the maintenance of a viable domestic uranium industry. DOE is thus in clear violation of the statute. This point is amply confirmed by the legislative history, and by the interpretation, approved by the Joint Committee on Atomic Energy, given the statute by DOE's predecessor. DOE's claim that it will be "hurt" by implementing the statute is insupportable. The Government has ample means to protect itself from harm, if any, flowing from discharging the law, and cannot excuse itself from a mandatory duty.

DOE's various arguments concerning its wish to be a reliable supplier, its desire not to harm trade with Canada and Australia, its feelings toward GATT, and its interest in non-proliferation policies are totally unavailing. Upon analysis, nothing in the injunction will conflict with any legitimate concern raised by DOE; where there is a possible conflict, it is because Congress expressly rejected the arguments now advanced by DOE and decided instead to require the agency to maintain a viable domestic uranium industry. Indeed, contrary to the representations of DOE, the protestations of Canada and Australia point to the value for the domestic uranium industry of enforcing the statute, and are hardly grounds for not enforcing a statute largely directed against uranium imports from those two countries and from South Africa.

### IV. ARGUMENT

There is neither a conflict in the Circuits nor a substantial question which warrants further review in this case. The unanimous judgments of the court of appeals and the district court below are correct.

#### A. Section 161v. Is Mandatory.

Section 161v. of the AEA, 42 U.S.C. 2201v, speaks in mandatory terms. It states that the agency "shall" issue criteria setting forth the terms and conditions under which enrichment services will be offered; that the agency "to

the extent necessary to assure the maintenance of a viable domestic uranium industry, *shall not offer* [enrichment] services" for foreign source uranium intended for domestic end-use; and that the written criteria "*shall*" set forth the conditions governing enrichment of foreign-source uranium for domestic end use. Emphasis added. "Shall" when used in a statute is ordinarily mandatory language. *E.g.*, *Parsons v. Board of Parole*, 107 S.Ct. 2415, 2420 (1987); *Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C.Cir. 1977); *Moon v. U.S. Dept. of Labor*, 727 F.2d 1315, 1318-19 (D.C.Cir. 1984).

Contrary to DOE's representations, the mandatory nature of section 161v. is corroborated by the relevant legislative history. In particular, when the Private Ownership of Special Nuclear Materials Act was considered by Congress in 1963-64, uranium producers expressed concern about the continued viability of the U.S. uranium industry.<sup>19</sup> Officials of DOE's predecessor, the AEC, responded that the agency would assure the maintenance of a viable domestic uranium industry by limiting enrichment of foreign source uranium or by taking other measures to limit importation of uranium under the general powers conferred by the AEA.<sup>20</sup> Representatives of the uranium producers responded that the issue should *not* be left to the AEC's discretion because producers required a more concrete and permanent assurance of federal commitment in order to make the investments necessary to maintain a viable domestic industry.<sup>21</sup> Congress accordingly adopted

<sup>19</sup> See *Private Ownership of Special Nuclear Materials, Hearings before the Legis. Subcomm. of the Jt. Comm. on Atomic Energy*, 88th Cong., 1st Sess. 114-15 (1963); *Private Ownership of Special Nuclear Materials, 1964, Hearings before the Legis. Subcomm. of the Jt. Comm. on Atomic Energy*, 88th Cong., 2d Sess. 154 (1964). See also Montange, *supra*, at 13.

<sup>20</sup> 1964 Hearing, *supra*, at 5.

<sup>21</sup> 1964 Hearing, *supra*, at 155.

section 161v., which insofar as is relevant here, was language proposed by the uranium producers.<sup>22</sup> The only conclusion from this history is that the purpose of the uranium proviso in section 161v. is to assure that the Government acts to preserve the viability of the domestic uranium industry.<sup>23</sup> The mandatory nature of the uranium proviso is fully supported by the initial construction given the statute by the AEC. The Commission initially implemented the statute by barring enrichment of foreign-source uranium for domestic end-use in 1966.<sup>24</sup> Although the Commission acted in 1974 to remove the bar during the period 1978-83 due to now obviously erroneous forecasts concerning the future of the nuclear industry,<sup>25</sup> the Commission specifically informed Congress that it would reinstitute limits on as little as two days' notice<sup>26</sup> or take other actions halting imports if the viability of the domestic industry were ever again threatened.<sup>27</sup> In short, the legislative history and the original construction of the statute both sup-

<sup>22</sup> See Montange, *supra*, at 14-15.

<sup>23</sup> DOE refers to language in the legislative history to the effect that the uranium proviso is "flexible." That language refers to flexibility in that the proviso was not contrary to the General Agreement on Trade and Tariffs and afforded DOE some discretion in setting the amount of the enrichment limitation or in taking other steps (e.g., prohibitions on importing uranium) that would otherwise assure domestic uranium industry viability. See note 41 *infra*.

<sup>24</sup> See 31 Fed. Reg. 16479 (Dec. 23, 1966).

<sup>25</sup> See AEC, *The Nuclear Industry 1* (1973); *Proposed Changes in AEC Contract Arrangements for Uranium Enriching Services, Hearings before the Energy Subcomm. of the Jt. Comm. on Atomic Energy*, 93d Cong., 1st Sess. 7 (1973); *Uranium Enrichment: Heading for the Abyss*, 221 Science 730 (1983).

<sup>26</sup> *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use, Hearings before the Joint Comm. on Atomic Energy*, 93d Cong., 2d Sess. 6, 9, et seq. (1974) (testimony of General Counsel Mercer, AEC Commissioner Anders and others).

<sup>27</sup> 1974 Hearings, *supra*, at 8 and 232-33.



port a mandatory interpretation.<sup>28</sup>

The Government suggests that a mandatory interpretation of section 161v. would lead to absurd results (namely, no available nuclear fuel) if the United States lacked sufficient uranium reserves to meet its needs. Pet. Cert. at 19. But like arguments that Columbus would drop off the edge of the world in proposing to sail west, the Government's argument runs afoul of the facts. According to DOE figures, the United States has proven uranium reserves sufficient to meet *all* its requirements for at least 40 years, which is longer than the expected lifetimes of all existing nuclear power reactors.<sup>29</sup> The real point is that, absent DOE implementation of section 161v., only a small fraction of U.S. reserves will ever be employed.<sup>30</sup>

<sup>28</sup> The fact that the legislative history and administrative practice confirm the mandatory nature of the uranium proviso in section 161v. fully distinguishes this Court's decision in *Young v. Community Nutrition Institute*, 106 S.Ct. 2360 (1986). In addition, unlike the situation in *Young*, where the Food and Drug Administration had taken alternative measures (tolerance levels) sufficient to assure the public health with respect to aflatoxins, the Government has here done nothing sufficient to assure the maintenance of a viable domestic uranium industry, as demonstrated by the Government's admission that the industry is non-viable.

<sup>29</sup> Compare DOE Energy Information Administration, 1985 Viability Assessment at 55 (1.7 billion pounds of reserves) with *id.* at 22 (table 13) (40 million pounds used per year domestically through turn of century).

<sup>30</sup> Such non-use of U.S. reserves is directly contrary to the interpretation of the statute rendered by DOE's predecessors. For example, AEC Chairman Schlesinger testified in 1972 that "if there are American reserves to be exploited, the intention would be that those reserves would be exploited." Mr. Schlesinger emphasized that the Government would implement section 161v. so as to assure a "viable and expanding" raw materials industry. AEC Auth. Legislation for FY 1973, *Hearings before the Jt. Comm. on Atomic Energy*, 92d Cong., 2d Sess. 2328 (1972) reprinted in *Status of the Domestic Uranium Mining and Milling Industry: The Effect of Imports*, Hearing before the Energy Res. & Dev. Subcomm. of the Senate Energy and Nat. Res. Comm., 97th Cong., 1st Sess. at 487 (1981).

DOE's current justification for inaction is that it need only act if an enrichment limitation is "necessary" to maintain uranium industry viability, and that it is not "necessary" because it would be potentially harmful to DOE's own business while not necessarily assuring long-term uranium industry viability. Pet. Cert. at 16. DOE, overlooking the fact that it moved for summary judgment and that it relied on other grounds before the district court,<sup>31</sup> adds that if the uranium industry now wishes to dispute the agency's counter-intuitive conclusion concerning potential harm to DOE and lack of benefit to uranium producers, the case should be remanded for trial. Pet. Cert. at 23.<sup>32</sup>

There are two ready responses to DOE's latest claim, neither of which involves any triable issue whatsoever. First, the statute requires the imposition of enrichment limitations if viability of the domestic uranium industry is threatened. The Government is simply refusing to act as Congress directed. But "[a]n agency may not confer upon itself power" to act in a fashion contrary to the provisions Congress has made. *Louisiana Public Service v. F.C.C.*, 106 S.Ct. 1890, 1901 (1986). As this Court there said,

<sup>31</sup> DOE argued in district court that its implementation of section 161v. was subject to congressional oversight, and because Congress had not compelled DOE to limit enrichment of foreign-source uranium by adopting a specific import limit (presumably in violation of GATT), the court should not enforce section 161v. See Memorandum in Support of Defendants' Motion for Judgment on the Pleadings and Motion for Summary Judgment . . . , dated Sept. 30, 1985, at 17-26, in *Western Nuclear v. Huffman*, CA 84-C-2315.

<sup>32</sup> DOE claims at 23 n.17 of its Petition that the domestic producers "have never challenged the Secretary's determination that restrictions would not assure the maintenance of a viable domestic uranium industry." This is false. Both the producers and the Amici States have demonstrated both in the litigation and in congressional testimony that enrichment limitations would assist the domestic uranium industry. U.S. utilities are importing foreign uranium for domestic end-use. If they cannot enrich foreign uranium at DOE, which provides over 90% of the enrichment services used by U.S. utilities, the utilities will use additional domestic uranium.



"[t]o permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant the agency power to override Congress. This we are both unwilling and unable to do."

Second, the federal government has ample power to render the uranium proviso in section 161v. fully effective. DOE's predecessor, the AEC, testified to Congress that if the Government's enrichment business were ever threatened, or if for some other reason an enrichment limitation would not be the best method to assure uranium industry viability, then it would limit importation of uranium or enriched uranium under other provisions of the AEA.<sup>33</sup> AEC did not testify that the government could do nothing, nor did Congress understand section 161v. to permit inaction, which is hardly surprising since the uranium proviso in section 161v. was clearly adopted to compel action. In addition, the AEC indicated that the AEA conferred all the necessary authority to formulate supplementary relief if in fact required.<sup>34</sup> Nothing in the statutes abolishing the AEC or establishing DOE or its sister agency, the NRC, altered any of the relevant authorities provided by the AEA. DOE accordingly has ample authority, either on its own or in conjunction with the licensing jurisdiction of the NRC,<sup>35</sup> to limit importation of enriched uranium under

<sup>33</sup> See *Private Ownership of Special Nuclear Materials*, Hearings before the Legis. Subcomm. of the Jt. Comm. on Atomic Energy, 88th Cong., 1st Sess., at 29-30 (1963); *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use*, Hearings before the Jt. Comm. on Atomic Energy, 93d Cong., 2d Sess., at 8, 232-33 (1974).

<sup>34</sup> See sources in note 33 *supra*.

<sup>35</sup> NRC has broad authority to regulate, limit and bar importation of enriched uranium under sections 161b., i, and p. of the Atomic Energy Act. See *Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 771 (3d Cir. 1979). NRC has acknowledged in response to questions from Congress that it can act to limit importation of enriched uranium in order to

sections 161b. and 161p. of the AEA, 42 U.S.C. 2201b. & p.<sup>36</sup> These provisions authorize the implementing agency to adopt regulations and orders as it "may deem necessary [or] desirable to promote the common defense and security" or "as may be necessary to carry out the purposes of [the Atomic Energy Act]." One of those purposes to whose accomplishment these provisions are devoted is maintenance of the viability of the domestic uranium industry (see section 161v. of the Act). It is also noteworthy that Congress adopted the uranium viability proviso at least in part for national security reasons. It follows that DOE can, just as the AEC could, require domestic utilities to obtain their enrichment services from the Government. Compare *Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 771 (3d Cir. 1979). DOE alone or with NRC can thus render 161v. fully effective through use of other portions of section 161. Seen in this light, any injury sustained by DOE will be purely self-inflicted, and the agency's claims that nothing can be done for the domestic uranium industry are purely spurious.<sup>37</sup>

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protect DOE's enrichment enterprise or the viability of the uranium industry upon proper request from, among others, DOE. See answers attached to Opposition to Emergency Motion for Stay filed by Amici States in the Tenth Circuit. The Chairman of the House Interior Committee (one of the authorizing committees with jurisdiction over the DOE and NRC) in a recent colloquy upon adoption of the NRC Authorization Bill for fiscal 1988 and 1989 (H.R. 1315) confirmed NRC's authority in this regard. 133 Cong. Rec. H 7036 (August 4, 1987) (Cong. Udall and Cong. Richardson). See also *id.* H 7159 (August 5, 1987) (similar statement by Cong. Nielson). Such action is certainly consistent with prior AEC statements concerning its powers. See 1974 Hearings, *supra*, at 8 and 232-33.

<sup>36</sup> That DOE shares authority with NRC under sections 161b. and p. is clear. H. Rep. 93-707 at 27 and S. Rep. 93-980 at 84 (both agencies have authority under Energy Reorganization Act).

<sup>37</sup> The Government's only response to this point—the contention that authority to regulate imports now rests exclusively with the NRC, Cert. Pet. at 8—is thus clearly incorrect, and at the very least insufficient, misleading and unavailing.

The judiciary is the final authority on matters of statutory construction. *E.g.*, *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973). "If the intent of Congress is clear, that is the end of the matter." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Here the intent of Congress is clear. DOE is attempting to create ambiguity through smoke and mirrors. The agency's latest interpretation of the statute to this end violates the language of the AEA, ignores the legislative history of the relevant portions of the Act, and conflicts with a prior consistently held agency interpretation.<sup>38</sup> DOE's latest construction thus does not command respect. *See, e.g.*, *INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1221 n.30 (1987); *Santa Fe Pacific Railroad Company v. Secretary of the Interior*, 830 F.2d 1168, \_\_\_ n.91 (D.C. Cir. 1987) (collecting authorities).

DOE's claim concerning loss of business is hollow for other reasons as well. First, U.S. utilities have been extremely reluctant to go abroad for enrichment services, both because of cancellation penalties in DOE contracts and because of unreliability of foreign enrichment supplies. Second, publicly available information—including DOE data—shows that there is insufficient foreign capacity available to support wholesale diversion of business from DOE.<sup>39</sup> DOE's whole argument in this area is a *post hoc*

<sup>38</sup> The prior construction is entitled to special respect since it was approved by the Joint Comm. on Atomic Energy. *See Power Reactor Dev. Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408-09 (1961).

<sup>39</sup> According to the Congressional Budget Office, there are currently 5 to 6 million SWU's per year of excess capacity in Europe. CBO, U.S. Enrichment Options for a Competitive Program 17 (1985). This amount is expected to erode to only 2 to 3 million SWU's by about 1990. *See id.* at 15 and 17. There are approximately 6 million SWU's per year of uncommitted demand in the 1990's. *Id.* at 14. The uncommitted demand thus more than balances out available foreign excess capacity. CBO's figures on capacity and demand are equivalent to those given by DOE to the "Tricommittee Business Panel," *supra*, at 51-52.

rationalization for a policy in favor of unrestricted trade in uranium, which is directly contrary to the mandatory language of a statute.

#### B. The Decision Below Poses No Important Federal Question.

The final six pages of DOE's Petition for Certiorari embody an attempt to provide some sort of rationale for regarding this case as worthy of certiorari. We will address DOE's various contentions briefly here.

DOE asserts that the most important problem with the district court's injunction is that countries on whom the United States will be dependent for uranium (specifically, Canada and Australia) have objected to it and have argued that it is inconsistent with U.S. obligations under the General Agreement on Tariffs and Trade (GATT). Pet. Cert. at 25-26. GATT is not a treaty or statute and thus cannot override section 161v. The United States Trade Representative has informed Congress that implementation of section 161v. will not violate GATT.<sup>40</sup> In addition, Congress in adopting section 161v. specifically stated that it is not inconsistent with GATT.<sup>41</sup> Finally, neither Canada nor Australia pursued GATT claims when the United States implemented section 161v. through enrichment limitations during the period 1966 through 1983, presumably because

<sup>40</sup> Letter, Mr. Yeutter (U.S. Trade Rep.) to Cong. Udall (Chairman, House Interior Comm.), July 15, 1985 (enrichment limitation does not infringe GATT because it is a condition under which U.S. Government renders a service).

<sup>41</sup> S. Rep. No. 1325, 88th Cong., 2d Sess., reprinted in 1964 U.S. Code Cong. & Admin. News 3105, 3121 ("these reasonable and flexible restrictions on the performance of services by the Commission should not in any sense be deemed inconsistent with any obligations the United States may have under . . . [GATT] and other international trade agreements"). We also note that under Article XXI of GATT, the United States can impose whatever restrictions it chooses on trade in fissionable materials, of which uranium is the prime example, without infringement of GATT.



they recognized that such claims would not be fruitful. DOE cannot use the objections of foreign governments against whom a statute is directed in the trade area as grounds to evade the statute; the fact that the foreign governments are objecting to it is certainly not grounds for a writ of certiorari. The foreign objections are relevant only to show that the statute if implemented will be helpful in restoring a viable domestic uranium industry.

DOE also states that the injunction will inconvenience U.S. utilities which have purchased foreign uranium, because they will have to arrange alternative supplies. Pet. Cert. at 24.<sup>42</sup> U.S. utilities have been on notice since at least the filing of this lawsuit (some three years ago) that enrichment limitations may be imposed. Again, possible inconvenience to a few utilities which have been on notice for at least three years is neither grounds for a writ nor grounds to ignore section 161v.

DOE next claims that the injunction may result in loss of business to DOE. Pet. Cert. at 24-25. We have noted above a variety of reasons (a) why the injunction cannot result in any significant loss of such business and (b) why DOE can prevent any significant loss of business by doing exactly what its predecessor agency said it would do under those circumstances: either invoke authority under sections 161b. & p. of the AEA to limit importation of enriched material by order or regulation, or (now, through NRC) by imposing license conditions barring or limiting such importation for domestic consumption. DOE's conjectured losses can thus hardly create an issue worthy of certiorari.

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<sup>42</sup> DOE does not argue that there are no domestic uranium supplies available to meet U.S. needs. To the contrary, DOE argues that there is an oversupply. As already noted, DOE figures show that there are domestic reserves sufficient to meet U.S. needs for 40 years. Thus, domestic utilities will have ample uranium to meet their needs in the event that the injunction is enforced.

Finally, DOE claims that the injunction "threatens American non-proliferation efforts" by possibly resulting in the "loss of DOE's foreign enrichment customers" and by making the U.S. appear to be an "unreliable supplier" of nuclear technology. Pet. Cert. at 26-27. As to non-proliferation, the injunction only operates against *domestic use* of foreign-source uranium. DOE can continue to enrich foreign uranium for foreign use. The injunction thus has no direct effect on any of DOE's foreign accounts, and any conjectured indirect effect is highly implausible. DOE's intimations to the contrary are comparable to Chicken Little's remarks about the sky falling. DOE's claim about appearing to be an "unreliable supplier" is at best empty rhetoric. Nothing in the injunction interferes with any sales or transfers of U.S. nuclear material or technology by anyone in the United States to any foreign government or entity. In any event, a necessary condition to accomplishment of a goal of consistency and reliability of supply is that the agency comply with the law of the land as enacted by Congress, and not periodically ignore the law in favor of the passing whims of a constantly changing parade of unelected officials administering the enrichment program.

## V. CONCLUSION

DOE's Deputy Assistant Secretary for Enrichment Longenecker on August 4, 1987, characterized DOE's position in a fashion at odds with the Petition for Certiorari. Mr. Longenecker explained that DOE has "the largest market share, the lowest production costs, and most advanced technology development effort of any supplier [of enrichment in the world]."<sup>43</sup> DOE in fact controls over 90 % of the domestic market for enrichment services. This is hardly the picture of a party in peril, which DOE attempts to draw in this legal proceeding. In contrast, DOE admits

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<sup>43</sup> Letter, John Longenecker to Secretary of Energy Herrington, August 4, 1987.



that the domestic uranium industry sustained more than \$300,000,000 in losses in calendar 1984 and again in calendar 1985.<sup>4</sup> As stated in the Wall Street Journal on October 28, the uranium industry is "near death."

It is time for DOE to take action to assure the maintenance of a viable domestic uranium industry as required by section 161v. Indeed, the judiciary is obligated to compel DOE to act in the face of the agency's clear track record of obfuscation and delay. 5 U.S.C. 706(1). The district court and the Court of Appeals for the Tenth Circuit have merely discharged this obligation in the proceeding below. It is now time to bring this litigation to a close.

Amici States therefore respectfully request that this Court deny DOE's petition for certiorari.

Respectfully submitted,

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*on behalf of all Amici Curiae States*

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<sup>4</sup> See DOE EIA, Domestic Uranium Mining and Milling Industry, 1985 Viability Assessment at p. xiii.

(10)  
No. 87-645

Supreme Court, U.S.  
**FILED**  
FEB 25 1988

ROBERT E. GRANIER, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

**F. CLARK HUFFMAN, ET AL., PETITIONERS**

**v.**

**WESTERN NUCLEAR, INC., ET AL.**

**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

**JOINT APPENDIX**

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**PETITION FOR A WRIT OF CERTIORARI  
FILED OCTOBER 18, 1987  
CERTIORARI GRANTED JANUARY 11, 1988**

5187

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reproduced.



**Chronological List of Relevant Docket Entries**

**UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLORADO**

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**WESTERN NUCLEAR, INC., ET AL.**

**v.**

**F. CLARK HUFFMAN, ET AL., 84-C-2315**

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<b>Date</b>	<b>Proceedings</b>
12.07.84	Complaint filed
04.11.85	Answer filed, attached declarations of John R. Longenecker, Sherry E. Peske
07.10.85	Plaintiffs' motion for summary judgment on Counts I and V, with memorandum in support and attachments filed
07.25.85	State of Wyoming motion for leave to file amicus brief filed and amicus brief tendered
09.06.85	Minute order conditionally granting Wyoming motion to file entered
10.01.85	Defendants' motion for judgment on the pleadings, supporting memorandum with attachments, filed
10.28.85	Plaintiffs' response to motion for judgment on the pleadings or for summary judgment as to Count III filed
11.07.85	Uranium Producers' motion for leave to file amicus memorandum on Count I filed and amicus memorandum tendered

Date	Proceedings
11.21.85	Amicus brief of Wyoming filed; Uranium Producers' motion for leave to file amicus brief granted
11.26.85	Utilities' motion to file memorandum of law as amici filed; affidavit of Loring E. Mills filed; Defendants' reply memorandum as to Count III filed
01.21.86	Defendants' supplemental memorandum filed
01.29.86	Plaintiffs' memorandum in response to defendants' supplemental memorandum filed
02.14.86	Defendants' motion to stay proceedings pending rulemaking and memorandum in support filed
02.25.86	Plaintiffs' opposition to motion to stay proceedings pending rulemaking and supporting memorandum filed
06.05.86	Hearing held; Hearing Order entered
06.06.86	Defendants' opposition to entry of plaintiffs' proposed Order on Count I filed
06.16.86	Amicus Domestic Utilities' joiner of amici in opposition to proposed Order filed; Defendants' supplemental opposition to entry of plaintiffs' proposed injunctive Order on Count I filed
06.20.86	Order of the district court [reproduced in Appendix to Petition] entered
06.24.86	Defendants' motion for stay pending appeal and memorandum in support filed; Notice of Appeal filed

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

No. 86-1942

F. CLARK HUFFMAN, ET AL., DEFENDANTS/APPELLANTS

v.

WESTERN NUCLEAR, INC., ET AL., PLAINTIFFS/APPELLEES

Date	Proceedings
06.25.86	Appeal docketed
07.11.86	Appellants' motion for stay pending appeal filed
07.18.86	Appellees' response to stay motion filed
07.21.86	Appellants' application for stay of district court's injunction and motion to consolidate with No. 85-2428 [appeal of district court order on Count V of complaint] granted
08.20.86	Order entered granting amicus applications; amicus briefs filed
09.03.86	Additional amicus brief filed
09.11.86	Argued and submitted
07.20.87	Opinion filed—affirmed in part (as to Count I), reversed in part (as to Count V) and remanded; previously entered stay dissolved
07.23.87	Appellants' motion to stay judgment, stay order dissolving previous stay and stay mandate pending petition for certiorari filed
07.30.87	Appellees' response to stay motion filed
07.31.87	Appellants' reply to appellees' response filed

Date	Filings — Proceedings
10.08.87	Appellants' motion to stay issuance of mandate pending disposition of petition for writ of certiorari granted
12.02.87	Received notice of filing of petition for certiorari on 11.18.87
01.15.88	Received Supreme Court Order granting certiorari, dated 01.11.88
02.12.88	Record on certiorari along with district court record on appeal sent to Supreme Court

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 84-2315

WESTERN NUCLEAR, INC.; ENERGY FUELS NUCLEAR, INC.;  
AND URANIUM RESOURCES INC., PLAINTIFFS,

vs.

F. CLARK HUFFMAN, AS CHIEF, ENRICHMENT SERVICES  
BRANCH, ENRICHING OPERATIONS DIVISION, DEPARTMENT  
OF ENERGY;

SHERRY E. PESKE, AS ACTING DIRECTOR OF MARKETING  
AND BUSINESS OPERATIONS (URANIUM ENRICHMENT) OF  
THE DEPARTMENT OF ENERGY;

JOHN R. LONGENECKER, AS DEPUTY ASSISTANT SECRETARY  
FOR URANIUM ENRICHMENT OF THE DEPARTMENT OF  
ENERGY;

WILLIAM R. VOIGT, AS SPECIAL ASSISTANT FOR STRATEGIC  
POLICY ASSESSMENT TO THE ASSISTANT SECRETARY FOR  
NUCLEAR ENERGY OF THE DEPARTMENT OF ENERGY;

JAMES W. VAUGHN, AS ASSISTANT SECRETARY FOR  
NUCLEAR ENERGY OF THE DEPARTMENT OF ENERGY;

EARL GJELDE, AS SPECIAL ASSISTANT TO THE SECRETARY  
OF THE DEPARTMENT OF ENERGY;

DANIEL BOGGS, AS UNDER SECRETARY OF THE  
DEPARTMENT OF ENERGY;

DONALD P. HODEL, AS SECRETARY OF THE DEPARTMENT  
OF ENERGY; AND

UNITED STATES DEPARTMENT OF ENERGY, DEFENDANTS.



## COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Western Nuclear, Inc.; Energy Fuels Nuclear, Inc.; and Uranium Resources, Inc. (hereinafter referred to collectively as "Plaintiffs") for their Complaint against Defendants allege:

### A. JURISDICTION AND VENUE

1. Subject matter jurisdiction is based on 28 U.S.C. Sections 1331 and 1337. The matters in issue arise out of laws and regulations of the United States, and federal agency actions affecting interstate and foreign commerce. Venue is proper under 28 U.S.C. Section 1391(e) because, among other things, at least one of the plaintiffs resides in the State of Colorado within the District of Colorado.

### B. PARTIES

1. Western Nuclear, Inc. (Western), a plaintiff herein, is a Delaware corporation, with its principal place of business and headquarters at 134 Union Boulevard, Lakewood, Colorado 80228. Western owns uranium mills and mines in the states of Washington and Wyoming. Western also owns a uranium mine in the state of New Mexico and is a part-owner of a mine under development in Texas. As an owner of uranium mines and mills, Western is a participant in the domestic uranium industry and is directly or indirectly affected by the actions of the Defendants described below.

2. Energy Fuels Nuclear, Inc. (Energy Fuels), a plaintiff herein, is a Colorado corporation with its principal place of business and headquarters at Suite 900, 3 Park Central, 1515 Arapahoe Street, Denver, Colorado 80202. Energy Fuels owns uranium mines in the states of Utah, Arizona, and Wyoming and is part owner of a uranium

mill in Utah. As an owner of uranium mines and a mill, Energy Fuels is a participant in the domestic uranium industry and is directly or indirectly affected by the actions of the Defendants described below.

3. Uranium Resources, Inc. (Uranium Resources), a plaintiff herein, is a Delaware corporation with its principal place of business and headquarters at Suite 735, Promenade Bank Tower, Richardson, Texas 75080. Uranium Resources owns an in situ uranium mine in Texas. As an owner of a uranium mine, Uranium Resources is a participant in the domestic uranium industry and is directly or indirectly affected by the actions of the Defendants described below.

4. Defendant F. Clark Huffman is Chief, Enrichment Services Branch, Enriching Operations Division, Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Oak Ridge, Tennessee.

5. Defendant Sherry E. Peske is Acting Director of Marketing and Business Operations (Uranium Enrichment) of the Department of Energy, is sued in her official capacity, and resides for purposes of this proceeding in Washington, D.C.

6. Defendant John R. Longenecker is Deputy Assistant Secretary for Uranium Enrichment of the Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Washington, D.C.

7. Defendant William R. Voigt is Special Assistant for Strategic Policy Assessment to the Assistant Secretary of Nuclear Energy of the Department of Energy, and formerly Acting Director of the Office of Uranium Enrichment and Assessment of the Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Washington, D.C.

8. Defendant James W. Vaughn is the Assistant Secretary for Nuclear Energy of the Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Washington, D.C.

9. Defendant Earl Gjelde is Special Assistant to the Secretary of the Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Washington, D.C.

10. Defendant Daniel Boggs is Under Secretary of the Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Washington, D.C.

11. Defendant Donald P. Hodel is the Secretary of the Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Washington, D.C.

12. Defendant United States Department of Energy is a department in the Executive Branch of the Government of the United States and resides for purposes of this proceeding in Washington, D.C. at 1000 Independence Avenue, S.W.

### C. OVERVIEW

This is a Complaint in five counts for declaratory and injunctive relief against the United States Department of Energy and certain of its officials (collectively referred to herein as "DOE"). The five Counts are summarized below.

1. (a). Under section 161(v) of the Atomic Energy Act, 42 U.S.C. Section 2201(v), enacted in 1964, DOE is obligated to limit the enrichment of foreign uranium for domestic end uses so as to "assure the maintenance of a viable domestic uranium industry". Section 161(v) was originally implemented by barring enrichment of foreign-

source uranium for domestic end-use. Limitations upon enrichment of foreign uranium have now been phased out.

(b). Subsequent to the decision to phase out these limitations, the domestic uranium industry has collapsed: many companies have or are exiting the industry; many mines or mills have either closed or severely curtailed operations; thousands of uranium miners and other workers have lost their jobs; and the price of uranium, in real terms, is less than at any time since the adoption of the statute. During the same period, commitment for importation of foreign uranium have escalated to nearly half domestic demand.

(c). Plaintiffs have repeatedly requested DOE to take action to assure the maintenance of a viable domestic uranium industry as required by section 161(v). DOE has unlawfully failed to implement section 161(v). This Court should declare the meaning of the term "viable" as employed in section 161(v); should order DOE to initiate proceedings leading to the adoption of appropriate limits on enrichment of foreign source uranium for domestic end-use; and should require DOE to impose appropriate interim limitations on such enrichment pending the outcome of such proceedings.

2. 42 U.S.C. Section 7191 requires DOE to comply with notice-and-comment rulemaking requirements described in 5 U.S.C. Section 553, including those requirements with respect to public property and contracts. DOE, on January 18, 1984, issued a new standard form enrichment contract, termed the "Utility Services" or "US" contract without compliance with 5 U.S.C. Section 553 and 42 U.S.C. Section 7191. Similarly, DOE unlawfully failed to submit the new enrichment contract in proposed form to pertinent committees of Congress for 45 days prior to its issuance, as required by 42 U.S.C. Sections



2201(v) and 2258. The new enrichment contract should accordingly be invalidated.

3. The standard form enrichment contract requires DOE customers to purchase a fixed amount of enrichment service for each unit of uranium furnished DOE. This "fixed tails" policy limits demand for domestic uranium, which is detrimental to the maintenance of a viable domestic uranium industry, is unlawful, and contravenes 42 U.S.C. sections 2201(v) and 2201(m). DOE should be barred from any continued enforcement or implementation of the fixed tails assay policy.

4. DOE sells enriched uranium of foreign origin from the federal government stockpile for domestic end-use pursuant to the policies known as the "split tails" and "pre-produced inventory" policies. These policies inhibit and prevent the development of sources of supply independent of the Department of Energy in violation of 42 U.S.C. Sections 2093 and 2201(m). DOE should be precluded from any further sales of uranium under the split tails and pre-produced inventory policies.

5. Under 42 U.S.C. Section 2210b, DOE is required to adopt regulations defining a viable domestic uranium industry for, among other reasons, requesting relief under section 262 of the Trade Expansion Act of 1962, 19 U.S.C. Section 1862, and section 201 of the Trade Act of 1974, 19 U.S.C. Section 2251. The regulations adopted (48 Fed. Reg. 45746 (Oct. 6, 1983)) did not comply with the statute and were issued in a manner contrary to 5 U.S.C. Section 553.

#### D. COUNT I

*(failure to implement section 161(v))*

1. The Plaintiffs hereby incorporate all the foregoing allegations.

2. Commencing in 1948, the Atomic Energy Commission ("AEC") sponsored and administered an extensive

program to foster the development of a domestic uranium industry in the United States and to attain domestic self-sufficiency. Pursuant to this program, the AEC, which was the sole purchaser of domestic-origin uranium until the 1960's, guaranteed the purchase price of uranium, assisted in the location and construction of uranium mills, and otherwise encouraged the development of a viable domestic uranium industry. By 1963, domestic self-sufficiency had been attained. The AEC also purchased large quantities of foreign-source uranium during this period, principally from South Africa and Canada.

3. In 1964 Congress passed the Private Ownership of Special Nuclear Materials Act (P.L. 88-489). This Act provided, among other things, for toll-paid enrichment services by the AEC for privately-owned uranium. Congress was concerned that during times of limited demand for uranium, the private market for the material would not be sufficient to assure the maintenance of a viable domestic uranium industry and, moreover, that from time to time the domestic industry would be subjected to "ruinous competition" from cheap foreign uranium. Congress viewed a viable domestic uranium industry as an important segment of the economy and as essential for the national security. Congress accordingly directed, that:

"the [Atomic Energy] Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source<sup>1</sup> or special nuclear<sup>2</sup> materials of for-

<sup>1</sup> "Source material" is defined in the Atomic Energy Act to mean "(1) uranium, thorium or any other material which is determined by the Commission pursuant to the provisions of [42 U.S.C. Section 2091] to be source material or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may, by regulation, determine from time to time." 42 U.S.C. Section 2014(z).

<sup>2</sup> "Special nuclear material" is defined in the Atomic Energy Act to mean "(1) plutonium, uranium enriched in the isotope 233 or in the



eign origin intended for use in a utilization facility [nuclear reactor] within or under the jurisdiction of the United States."

4. Acting pursuant to this provision, the AEC adopted criteria barring the enrichment of foreign-source uranium for domestic end-use. 31 Fed. Reg. 16479 (1966). In the early 1970's, the AEC projected a rapid expansion in the size of the civilian nuclear industry and a concomitant increase in demand for uranium. Under these circumstances, the AEC concluded that enrichment restrictions could be phased out without adverse impact on the domestic uranium industry. In 1974, the AEC adopted revised enrichment criteria phasing out restrictions on enrichment of foreign source uranium for domestic end-use by January 1, 1984. 39 Fed. Reg. 38016 (1974).

5. The projected increase in demand did not materialize. Subsequent to the relaxation of restrictions, imports of foreign-source uranium have ballooned and will continue to increase. Prices for uranium have dropped in real terms to levels less than those prevailing in 1966-67 when import restrictions were originally adopted. Costs, however, have escalated. Commitments to purchase domestic origin uranium have actually decreased. Exploration for domestic uranium reserves has come to a standstill and is at its lowest point since the inception of the domestic uranium industry after World War II. At least sixteen uranium mills have closed and the remaining 8 have curtailed production. Hundreds of mine projects have been terminated or suspended. Domestic uranium in-

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isotope 235, and any other material which the Commission, pursuant to the provisions of [42 U.S.C. Section 2071], determines to be special nuclear material . . . ; or (2) any material artificially enriched in any of the foregoing, but does not include source material." 42 U.S.C. Section 2014(aa).

dustry employment is currently less than one-fifth of the level which existed in 1980. Thousands of uranium miners are unemployed. Officials of the DOE charged with surveying the domestic uranium industry in fact concluded in 1982 that the industry could not be regarded as viable.

6. The domestic uranium industry is not "viable" for purposes of section 161(v) of the Atomic Energy Act.

7. Even if the domestic uranium industry were somehow viewed as viable, there is no assurance under these circumstances of continued viability within the meaning of section 161(v).

8. Imports of foreign-source uranium for domestic end use significantly contribute to the current non-viable condition of the nation's domestic uranium industry.

9. Under DOE estimates in 1981, imports were projected to account for approximately 9 percent of domestic demand for the next ten-year period. This was revised in 1983 to 30 percent. Experts now project that uranium imports will exceed seventy percent (70%) of domestic demand within a few years. These imports displace demand for domestic uranium, increase unit costs for remaining producers, force existing domestic facilities to shut down or curtail operations, cause unemployment, forestall the development of new uranium mines and mills necessary to supply future demand, and otherwise render the domestic uranium industry non-viable now and in the future.

10. Once domestic uranium mines and mills are shut down, federal and many state laws require initiation of decommissioning and reclamation activities. Enormous new capital investments and lengthy and costly regulatory delays must be incurred to open new facilities. In addition, a new labor force must be assembled and trained. As much as ten years are required for these tasks. Section 161(v) of the Atomic Energy Act was intended to avoid such an occurrence.

11. Since at least 1981, Plaintiffs have repeatedly requested that DOE implement section 161(v) of the Atomic Energy Act by reimposing limitations on the enrichment of foreign source uranium for domestic end use. DOE has arbitrarily and unlawfully failed to act in response to these requests. See Exhibits A-E.

12. In addition, Plaintiffs have repeatedly requested DOE to determine the viability status of the domestic uranium industry and have objected to DOE's erroneous working definition of viability. For example: By letter dated 18 June 1981, Western indicated that "viable domestic uranium industry" means an industry "capable of living, growing and developing in a favorable environment," that the domestic uranium industry is not viable, and that imports are a significant threat to the maintenance of the domestic uranium industry and a significant cause for its non-viable condition. By letter dated 23 December 1981, DOE unlawfully and arbitrarily defined a "viable" domestic uranium industry in essence as whatever industry, if any, remains regardless of unlimited importation of foreign-source uranium.

13. DOE's definition of viability for purposes of section 161(v) of the Atomic Energy Act is unlawful, arbitrary and capricious; renders section 161(v) nugatory; and contravenes the Atomic Energy Act.

14. DOE has failed to perform a clear, specific non-discretionary duty to limit enrichment of foreign source uranium for domestic end use so as to maintain the viability of the domestic uranium industry.

15. DOE's failure to take action to assure the maintenance of a viable domestic uranium industry is unlawful, arbitrary and capricious and renders section 161(v) nugatory.

16. DOE also has a duty to request the Nuclear Regulatory Commission (NRC) to implement restrictions

on the importation of enriched uranium pursuant to sections 53 and 69 of the Atomic Energy Act, 42 U.S.C. Section 2023 and 2099, and to take other measures necessary to assure the maintenance of a viable domestic uranium industry.

\* \* \* \* \*

#### K. PRAYER FOR RELIEF

WHEREFORE plaintiffs Western Nuclear, Inc.; Energy Fuels Nuclear, Inc.; and Uranium Resources Inc. request that the Court grant the following relief:

(a) A Declaration determining the meaning of "viable domestic uranium industry" for purposes of section 161(v) of the Atomic Energy Act, 42 U.S.C. Section 2201(v);

(b) A Declaration (i) invalidating all previous determinations by DOE that the domestic uranium industry is "viable" for purposes of section 161(v) and (ii) determining that there is currently no assurance of the maintenance of a viable domestic uranium industry for purposes of section 161(v);

(c) An Order setting a schedule requiring DOE within 60 days to propose and within 180 days to adopt criteria relating to enrichment of foreign-source uranium for domestic end use sufficient to assure the maintenance of a viable domestic uranium industry, and to make such other orders as it deems proper, including but not limited to, requiring DOE to request NRC, within a compatible time frame, to impose license conditions restricting importation of source material and special nuclear material pursuant to sections 53 and 69 of the Atomic Energy Act; 42 U.S.C. Sections 2073 and 2099;

(d) An Order prohibiting DOE from enriching foreign uranium for domestic end use, pending adoption of limita-

tions upon the enrichment of foreign uranium sufficient to assure the maintenance of a viable domestic uranium industry;

(e) A Declaration that the new US enrichment contract issued January 18, 1984, is null and void;

(f) An Order barring DOE from adopting a generic enrichment contract without compliance with the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and 42 U.S.C. 2201(v).

(g) An Order barring DOE from restricting the demand for domestic uranium by the utilization of any provision in current or future enrichment contracts implementing the fixed tails assay policy or any variant of that policy;

(h) An Order prohibiting direct or indirect sales of uranium from the U.S. government's uranium stockpile including any future sales pursuant to the split-tails or pre-produced inventory policies, in a manner consistent with DOE's duty to maintain a viable domestic uranium industry;

(i) A Declaration that the regulations published by DOE at 48 Fed. Reg. 45746 (October 6, 1983) are invalid and unlawful;

(j) Such other and further relief as the Court deems just and proper, including costs and reasonable attorney fees.

Respectfully submitted this 7th day of December, 1984.

SHAVER & LICHT

/s/ Harley W. Shaver

HARLEY W. SHAVER

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Counsel for Plaintiffs:

Western Nuclear, Inc.

Energy Fuels Nuclear, Inc.

Uranium Resources, Inc.



Department of Energy  
Washington, D.C. 20545

Dec. 28, 1981

Mr. Donald O. Rausch  
President  
Western Nuclear, Inc.  
134 Union Boulevard  
Lakewood, Colorado 80228

Dear Mr. Rausch:

Regarding your letter to me of November 12, 1981, my staff and I were happy to meet with you and with representatives from Homestake, Kerr-McGee, and Rocky Mountain Energy on October 27, 1981, to discuss the domestic uranium producing industry. I appreciated receiving your views and those of the other uranium producers. However, I am very concerned that you perceive that we at the Department of Energy (DOE) would disregard our obligations under Section 161v of the Atomic Energy Act. I cannot understand how you could have arrived at such an erroneous perception. Let me assure you that we take all of our obligations under the Act with the utmost seriousness. Furthermore, I have no recollection of saying that if we found the mining industry was not viable that we would not take steps to alleviate the situation. My staff at the meeting took fairly complete notes and there is no indication in their notes that I said anything like that.

Regarding the lay-off of 600 Western Nuclear employees, we understand this resulted from your decision to purchase uranium from the excess inventory of a reactor manufacturer to fill your sales contracts, rather than to

produce the uranium from your mine and mill. This decision did not relate to impacts of imported uranums, but from the excess inventories in a buyer's hands and a producer's willingness to buy from inventory rather than produce.

We share your concerns about the health of the U.S. uranium producing industry. However, we continue to believe that the industry has overbuilt capacity and must reduce production to be in better balance with demand. We know this will be a painful adjustment for some companies. But the adjustment must be made primarily because of nuclear power construction delays, cancellations, and lack of new reactor orders. After the adjustments are completed we believe the domestic uranium producing industry will continue to be viable. As you said during our meeting on October 27, this may result in fewer companies, and perhaps mainly the major oil producers, remaining as uranium producers. Nonetheless, the companies that remain as domestic uranium producers will comprise a viable industry and others can re-enter the industry as markets grow.

Regarding the Westinghouse Electric Corporation's settlement of its suits against uranium producers, based on information we have assembled, Westinghouse will receive 9 million pounds of foreign-origin  $U_3O_8$  over the next 5 years. We understand that this foreign-origin uranium will be used over at least a 10-year period which will represent less than 2 percent of domestic requirements over those years.

The other possible source of foreign-origin uranium that resulted from the Westinghouse settlement is through Gulf Oil Corporation which assumed responsibility for delivery of 13 million pounds of  $U_3O_8$  to be supplied over a period extending beyond the end of the century. It is uncertain at

this time how much of this uranium will come from Gulf's Mount Taylor mine in New Mexico and how much will come from Gulf's Canadian subsidiary, Gulf Minerals Canada, Ltd. Canadian Government approval will be required for export from Canada. If Canadian-origin uranium is used, it will be a domestic uranium producer who will decide to bring the foreign uranium into the country. Since Section 161v of the Atomic Energy Act was intended to assure the maintenance of a viable domestic uranium producing industry, it would seem incongruous to change import restrictions to limit the amount of foreign uranium used because of the potential use of foreign uranium by a domestic uranium producer.

Regarding your recommendation to Senator Domenici on "enrichment transactions—variable tails," a holder of DOE's Adjustable Fixed-Commitment (AFC) contract currently has considerable flexibility within the contract to select his own tails assay. The Variable Tails Assay Option (VTAC) contained in the AFC contract permits the contract holder, with 15 months notice before the beginning of a government fiscal year, to select the tails assay he wants to transact at during that fiscal year. For example, AFC contract holders have given us notice for the tails assay they want for FY 1983, which will begin on October 1, 1982. Twenty-three domestic utilities with AFC contracts could have used the VTAO in FY 1983. Of those 23 utilities, 12 have elected to use the VTAO and have selected tails assays from 0.16 percent U-235 to 0.30 percent U-235, with a weighted average of 0.220 percent U-235. In addition, the AFC contract permits an enrichment contract holder to vary his enrichment services by  $\pm 10$  percent in the fourth year of the contract and  $\pm 20$  percent in the fifth year of the contract. Currently, the fourth year in the contract is FY 1986 and the fifth year is

FY 1987. By using this flexibility plus the VTAO, a contract holder will be able to meet his enriched uranium needs with a tails assay as great as 0.30 percent U-235. However, we will continue to examine our AFC contract to see if greater flexibility can be included in the contract, while assuring that we are able to provide enrichment services on a sound basis. We will also examine carefully, as part of planning the operation of the DOE uranium enrichment plants, whether the transaction tails assay can be increased for all of our contract holders. Those utilities who hold our Requirements-type contract do not have the flexibilities that are contained in the AFC contract. However, the Requirements-type contract holder can switch to the AFC contract with no charge at any time.

Finally, regarding your recommendation to Senator Domenici on "enrichment transactions—uranium stockpile," I hope the comments provided by Dr. Shelby Brewer to you in his letter of November 27, 1981, clarifies the apparent misunderstanding on the "sale" of DOE-owned uranium. As Dr. Brewer explained, DOE is not in any way "selling" any of its uranium. Rather, it is merely accounting for material previously used in producing an inventory of enriched uranium.

Sincerely,

/s/ William R. Voigt, Jr.  
 WILLIAM R. VOIGT, JR.  
 Acting Director  
 Office of Uranium Enrichment  
 and Assessment  
 Nuclear Energy

cc:  
 Senator Pete V. Domenici

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-C-2315

WESTERN NUCLEAR, INC., ET. AL., PLAINTIFFS

v.

F. CLARK HUFFMAN, ET. AL., DEFENDANTS

**ANSWER**

Defendants respond as follows to the allegations of the complaint herein:

**FIRST DEFENSE**

The court lacks jurisdiction of the subject matter of this action.

**SECOND DEFENSE**

The complaint fails to state a claim upon which relief may be granted.

**THIRD DEFENSE**

Plaintiffs lack standing to bring this action.

**FOURTH DEFENSE**

Answering specifically the allegations of the complaint, defendants respond as follows to the particular paragraphs thereof:

1. Paragraph A-1 is a statement of jurisdiction and venue as to which no answer is required. To the extent an answer may be required, denied.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of ¶s B-1 through B-3.

3. As to ¶s B-4 through B-12, they constitute statements as to the identities of the defendants as to which no answer is required.

4. As to ¶s C-1 through C-5, the allegations constitute plaintiffs' characterizations of the matters at issue and conclusions of law, and no response is required. Further, insofar as the allegations of these paragraphs constitute the plaintiffs' summaries of their claims, the Court is respectfully referred to the defendants' responses to the particular allegations of the Court of the complaint which are set forth hereafter in this answer.

5. As to ¶ D-1, all of defendants' preceding responses are realleged and incorporated herein as though fully set forth.

6. As to ¶ D-2, admit.

7. As to ¶ D-3, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof, except to admit Congress' passage of P.L. 88-489 in 1964.

8. As to ¶ D-4, admit.

9. As to ¶ D-5, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof; except to deny that officials of the Department of Energy charged with surveying the domestic uranium market concluded in 1982 that the industry could not be regarded as viable.

10. As to ¶ D-6 through D-8, the allegations consist of conclusions of law as to which no answer is required. To the extent an answer may be required, denied.

11. As to ¶ D-9, admit the first two sentences. As to the third sentence, defendants are without knowledge or



information sufficient to form a belief as to the truth of the allegations thereof. The fourth sentence consists of conclusions of law as to which an answer is not required. To the extent an answer may be required, denied.

12. As to ¶ D-10, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof, except as to the last sentence thereof which consists of conclusions of law as to which an answer is not required. To the extent an answer may be required, denied.

13. As to ¶ D-11, the allegations are denied except to admit the allegations of the first sentence.

14. As to ¶ D-12, the allegations are denied, except to admit the exchange of correspondence between plaintiff Western and the Department of Energy on June 18, 1981 and December 23, 1981.

15. As to ¶ D-13, the allegations are denied.

16. As to ¶ D-14, the allegations constitute conclusions of law as to which an answer is not required. To the extent an answer may be required, denied.

17. As to ¶s D-15 and D-16, the allegations are denied.

\* \* \* \* \*

For further answer, defendants deny all allegations of the complaint not heretofore Admitted or Denied.

Finally, defendants deny that plaintiffs are entitled to any of the relief they seek or to relief in any other form.

WHEREFORE, defendants request that the complaint herein be in all respects dismissed with prejudice; that defendants recover costs; and, that defendants be granted such other and further relief to which they are entitled.

Respectfully submitted,

RICHARD K. WILLARD  
Acting Assistant Attorney General

ROBERT N. MILLER  
United States Attorney

DENNIS LINDER

STEPHEN E. HART

/s/ Stanley Dalton Wright  
STANLEY DALTON WRIGHT

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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Civil Action No. 84-C-2315

WESTERN NUCLEAR, INC., ET. AL., PLAINTIFFS,

v.

F. CLARK HUFFMAN, ET. AL., DEFENDANTS.

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MEMORANDUM IN SUPPORT OF MOTIONS FOR  
SUMMARY JUDGMENT ON COUNTS I AND V

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I. Introduction

Under Section 161(v) of the Atomic Energy Act, the Department of Energy (DOE) is required to regulate the nation's uranium enrichment program so as "to assure the maintenance of a viable domestic uranium industry." The same statute requires the DOE to establish criteria setting forth, *inter alia*, "the extent to which [enrichment] services will be made available for [uranium] of foreign origin intended for use in" the United States. 42 U.S.C. § 2201(v)(B) (1982).

Section 170B of the Atomic Energy Act, 42 U.S.C.A. § 2210b (West Supp. 1986), also relates to DOE's responsibilities respecting the viability of the domestic uranium industry. This Section requires the DOE to monitor and, for the years 1983 to 1992, to report annually on the viability of the domestic mining and milling industry. For that purpose, Section 170B requires the DOE to establish by rule, after public notice and opportunity for comment, specific criteria by which viability shall be assessed. Sec-

tion 170B explicitly enumerates eight factors which must be included in the DOE's assessment of viability.

The DOE has failed to adhere to its obligations under each of these statutory sections. As Count I of the complaint alleges, the domestic uranium industry is in its most depressed condition since its inception. It is clearly non-viable for purposes of Section 161(v) of the Atomic Energy Act. Yet DOE, which has a duty to limit enrichment of foreign source uranium for domestic end use to the extent necessary to assure the maintenance of a viable domestic uranium industry, has failed to take any such action, despite repeated requests. In the light of the present condition of the industry, the DOE must be required to initiate a proceeding under a prescribed time schedule to impose appropriate limitations on enrichment of foreign source uranium for domestic consumption.

Count V of the complaint alleges that the criteria that DOE has promulgated by which viability of the domestic uranium mining and milling industry is to be measured are fatally flawed for two reasons. Procedurally, these criteria should be set aside because they were not developed, as the statute requires, in accordance with the Administrative Procedure Act and with the requirements of 42 U.S.C. § 7191 (1982). Substantively, the criteria should be set aside because the DOE has adopted criteria for measuring viability that are patently at odds with the language of the statute.

No genuine issues of material fact are presented by either of these claims. With respect to Count I, there is no question but that the DOE makes no effort at all to restrict its enrichment of foreign uranium destined for domestic use. There also can be no genuine issue as to the facts which evidence the distressed state of the domestic industry. Whether these facts show that the DOE is, or is

not, managing its enrichment program consistently with the requirements of Section 161(v) is purely a question of law. This question involves nothing more than assessing the undeniable present state of the industry with what this Court determines to be the meaning of Section 161(v).

As to Count V, the procedural issue presented involves a comparison of the final criteria with those that were initially proposed and on which notice and comment procedures were had. After the variance between the text of the two sets of criteria is ascertained, the Court is then called upon to decide the legal issue of whether this variance is so great as to have required notice and comment procedures before the final criteria could have been lawfully adopted. The substantive issue of Count V requires the Court to decide whether the text of the criteria adopted by the DOE is consistent with the statute.

Trial is neither necessary nor appropriate to decide these legal issues. Trial would not establish any additional facts necessary to decide the issues presented. Trial would not be appropriate, moreover, because it would unnecessarily burden the Court and the parties, and because plaintiffs requires as speedy a resolution of these issues as is possible if they are to secure meaningful relief. The industry is in dire straits and, as mining and milling facilities continue to close, and labor forces disperse, it will become increasingly difficult to reconstitute a viable domestic industry. Summary judgment is clearly appropriate, and urgently required.

## II. Summary Judgment on Count I Should Be Granted

Congress has long been concerned first to establish and then to maintain a viable domestic uranium mining and milling industry. When the 1964 amendments to the Atomic Energy Act were enacted, the Joint Committee

noted that the Government, faced with the fact that the United States had been "a have-not Nation" ten years before in terms of discovered uranium reserves, had "embarked upon an ambitious program of exploration for uranium" in order to supply the raw material product essential to both nuclear weapons and the development of peacetime applications. S. Rep. No. 1325, 88th Cong., 2d Sess. 1964, reprinted at 1964-2 U.S. Code & Ad. News 3105, 3114. As a result, "a substantial uranium mining and milling industry" has been created. *Id.* In 1964 the Government was the sole large-scale purchaser of U.S. uranium. Projections were that its future purchases would not be large enough "to support a viable domestic uranium industry" beyond the date (1970) when then-current Government purchasing contracts would expire. *Id.* Thus, the Committee noted, in the 1970s and beyond the domestic uranium industry would have to depend upon the civilian power program for its "primary market." *Id.*

In 1964, Congress enacted the Private Ownership of Special Nuclear Materials Act. One of the purposes of the legislation was to create this civilian market. The Act authorized both private ownership of uranium and enrichment of such privately owned uranium by the Commission. Congress was deeply concerned that the United States retain assured and reliable domestic supplies of uranium for the future nuclear industry. Indeed, Congress specifically observed that "[t]he maintenance of a domestic uranium mining and milling industry is an essential part of a sound nuclear industry and is also vital" to national security interests. *Id.* at 3115 and 3135. Provision for enrichment of privately-owned uranium was seen as "a desirable step in this direction." *Id.*

Enrichment of privately-owned uranium was authorized to begin in 1969. Some AEC officials projected that enrichment of foreign uranium intended for domestic use



might begin by mid-1975, because by that time "the civilian requirements are expected to be sufficiently high that the viability of the domestic industry would no longer be at stake." *Id.* at 3135. Because it was recognized to be impossible to predict the condition of the domestic uranium industry a decade hence, *id.*, the Commission's authority to enrich foreign uranium was made conditional. The Commission was "directed" by Section 161(v) "not to offer uranium enrichment services" for foreign uranium "to the extent necessary to assure the maintenance of" a viable domestic industry. *Id.* at 3120.<sup>1</sup> The Joint Committee noted that concern that had been expressed at its hearings as to the effect on the domestic industry of imports that could have "serious impact," particularly during periods of limited demand. *Id.* Accordingly, the bill contained a "flexible restriction" allowing the Commission "to review periodically" the condition of the domestic and world uranium markets and to offer enrichment only insofar as to do so would be consistent with maintenance of a viable domestic uranium industry. *Id.* The Joint Committee concluded that a statutory restriction on the importation of foreign uranium would not be appropriate, but that "it would be reasonable to place restrictions upon the performance of services by the Commission where the enrichment of foreign material would have an adverse effect on the domestic uranium industry." *Id.* at 3121.

<sup>1</sup> The AEC testified in 1963 and again in 1974 that it also had authority under other provisions of the Atomic Energy Act to impose, through conditions of restrictions on import licenses or facility licenses, limitations on the importation of both uranium or enriched uranium in order to maintain both the domestic uranium industry and the government's enrichment enterprise. See, e.g., Private Ownership of Special Nuclear Materials, Hearings before the Subcommittee on Legislation of the Senate Committee on Atomic Energy, 88th Cong., 1st Sess. 30 (1963).

Thus, the context of the enactment of Section 161(v) was that a viable domestic uranium industry was deemed essential both to national security, and to the nascent nuclear power industry which was expected to supply increasing percentages of the nation's energy requirements. Purchases for military needs were expected to decline after 1970 and it was thought that civilian needs would have to create the market that would be necessary to maintain viability of the producer industry. Enrichment of foreign uranium was authorized in 1964 to begin about 1975 on the basis of demand projected for that later period. It was understood that conditions would have to be monitored, and a flexible enrichment policy for foreign uranium was established. The Commission was "directed" to use this flexibility to assure the continued viability of the domestic industry.

The Atomic Energy Commission originally took decisive action to carry out its obligations under the 1964 Act. In 1966, the Commission adopted enrichment criteria barring any enrichment of foreign source uranium for domestic end use.<sup>1</sup> In 1968 the Commission advised that it was continuing to review the restriction on enrichment of foreign uranium intended for domestic use, that it was considering a graduated withdrawal of restrictions, and that any relaxation of restrictions would be "consistent with reasonable assurance of the viability of the domestic uranium industry."<sup>1</sup> The Commission further advised that the criteria "which in its judgment would characterize a viable industry" would be economic factors such as the

<sup>1</sup> 31 Fed. Reg. 1679 (1966).

<sup>1</sup> *Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports: Hearings Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 415 (1981) (AEC: Statement on Uranium Supply Policies and Related Activities).

size of the market, the price of uranium, the size of domestic reserves, the rate of development of new reserves, the probable penetration of the domestic market by foreign imports, and the size of the export market. *Id.*

In testimony during these years the Commission repeatedly confirmed that the authority granted by Section 161(v) was only to be employed consistently with the economic viability of the domestic uranium industry. For example, in 1972 the Chairman of the Commission testified that any modification in the then-existing total import restriction would remain consistent with a growing domestic industry. In particular, he explained that any revision:

"would be adjusted so as to take an unbearable load off American suppliers, but would still permit the growth of American industry. . . . If there are American reserves to be exploited the intention would be that those reserves would be exploited."<sup>2</sup>

The following exchange ensued:

*Rep. Hosmer:* In other words, whatever this thing comes up to be, it will be on the basis of maintaining a viable and expanding raw materials industry in the United States?

*Dr. Schlesinger:* Yes, sir.

*Rep. Hosmer:* There is no question about that?

*Dr. Schlesinger:* No, sir.<sup>1</sup>

<sup>2</sup> *Nuclear Fuels; Regulation: Hearings on AEC Authorizing Legislation FY 1973 Before the Joint Comm. on Atomic Energy*, 92d Cong., 2d Sess. 2328 (1972) (testimony of James R. Schlesinger, Chairman AEC).

<sup>1</sup> *Id.*

Similarly, Commissioner Anders testified in 1974 that

"Should there be any indication that the proposed Schedule is endangering domestic industry viability, U.S. self-sufficiency, or our national security, the Commission will reimpose restrictions or take such other steps as might be appropriate."<sup>2</sup>

In 1973 the Commission proposed a plan allowing the gradual removal of restrictions on enrichment of foreign uranium during the years 1977-83. 38 Fed. Reg. 32595 (1973). The plan was predicated on projections for nuclear power growth that have proved to be far too optimistic. Under this plan there were to be no restrictions on use of Commission facilities to enrich foreign uranium starting in 1984. After Congressional review, this plan was promulgated. The Commission stated that it "will monitor the extent of importation of foreign uranium for domestic use and its effect on the viability of the domestic uranium producing industry and on the President's objective of achieving a national capability for energy self-sufficiency." 39 Fed. Reg. 38016 (1974).

The fact that no enrichment of foreign uranium was allowed until 1977, and then only phased reductions of restrictions from 1977 to 1983 were permitted, indicates that at that time there was sufficient concern about the viability of the domestic industry to control foreign enrichment. It is anomalous that throughout this period the domestic uranium industry was healthier than it is today. Now, when the very existence of the domestic industry is threatened, DOE is allowing unrestricted domestic utilization of foreign source uranium. This

<sup>2</sup> *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use: Hearings Before the Joint Comm. on Atomic Energy*, 93rd Cong., 2d Sess. 6 (1974) (Testimony of Wm. A. Anders, Commissioner AEC).



perverse interpretation of the Congressional direction contained in Section 161(v) does not withstand even cursory scrutiny.

Plaintiffs' and *amicus*' papers filed in connection with Count II of the complaint detail the manner in which the DOE is currently manipulating its enrichment program to the detriment of the domestic uranium industry. The DOE's refusal to impose any restrictions on enrichment of foreign uranium is apparently part of the same overall program to reduce its costs, and therefore its prices, of enrichment. Both DOE's own studies and the affidavits attached to this motion attest to the fact – and surely this is a fact that the Government's lawyers cannot genuinely dispute – that this DOE policy is occurring at a time when the domestic uranium industry is in a desperate economic condition from which it may not recover.

In July 1982 the Grand Junction Area Office of the DOE prepared an analysis of the domestic uranium industry. That analysis determined that industry employment had fallen 50 percent in three years; 31 percent of production capacity had been shut down in the past year, and that an additional 31 percent was idle for lack of a market; production of  $U_3O_8$  had fallen from 22,000 tons in 1980 to a projected 14,000 tons in 1982; the spot price had fallen to \$19 per pound from its 1978 price of \$43 per pound; domestic production costs were such that domestic producers could not afford to sell at prices "even approaching" current prices. Based upon these determinations the report concluded that "[T]he uranium industry is clearly in a state of depression" and "can hardly be viewed as being viable."<sup>1</sup>

<sup>1</sup> *Status of the U.S. Uranium Industry, July 1982* (copy attached). Also attached is a DOE memorandum of August 9, 1982 indicating that these judgments were to be suppressed when the report was sent to Congress.

The attached affidavits establish that the conditions described by DOE in 1982 have become worse. Domestic production of uranium had declined from 43.7 million pounds in 1980 to 14.8 million pounds in 1984. Sabo Aff. ¶ 4, 6. Industry production in 1985 is expected to be less than 12 million pounds. *Id.* at ¶ 7. Industry employment has declined from 22,191 persons in 1979 to approximately 2,000 today. *Id.* at ¶ 8.

In New Mexico, one of the two principal producing states, production has declined from 8,539 tons in 1978 to 2,550 tons in 1983, with 1984 levels substantially lower. Biderman Aff. ¶ 6. Only one mill is operating in New Mexico, and only one mine. *Id.* at 8. By comparison, as recently as 1981 there were 38 mines and 5 mills operating in the state. *Id.* In 1978, six million feet of exploratory drilling were performed in New Mexico compared with only 100,000 feet of such drilling in 1983. *Id.* at 9.

The picture is the same in Wyoming, which once was another major uranium producing state. There production has declined from 7.53 million tons in 1980 to 0.472 million tons in 1984. Goodier Aff. ¶ 7. In 1980 there were 17 mines and 8 mills operating in Wyoming; now there are only 4 mines and 3 mills in operation. *Id.* at ¶ 9. Exploration has dried up in Wyoming as it has in New Mexico. *Id.* at ¶ 10. In 1979 approximately 5,300 persons were employed in uranium production in Wyoming; now only 850 persons are so employed. *Id.* at 11.

Demand for domestic source uranium is expected to decline through the year 2000. Garrow Aff. ¶ 3. The "U.S. uranium supply industry is deteriorating at an accelerating rate. . . ." *Id.* at ¶ 6. Firms are taking significant asset write-offs and write-downs in recognition of the reduced, or eliminated, earning power of these assets. *Id.* The Colorado Nuclear Corporation (CNC), a consulting firm specializing in the nuclear fuel cycle, concludes "that a



very limited number of domestic producers are [sic] likely to survive current market conditions." *Id.* If present conditions continue, CNC expects domestic uranium production levels will decline below 10 million pounds per year by the late 1980s. U.S. uranium demand will be about 40 million pounds per year. *Id.* Foreign source uranium may supply in excess of 60 percent of domestic requirements by the late 1980s. *Id.* The "domestic uranium industry in its present state cannot be considered viable." *Id.* Imports of uranium as a percentage of pounds consumed domestically have increased from 8.7 percent in 1980 to 58.2 percent in 1984. White Aff. ¶ 7, 8.

Two basic facts are therefore clear and beyond genuine dispute: (1) the domestic uranium industry is not viable and has no present prospect of becoming so;<sup>1</sup> (2) the DOE is not administering the enrichment program so as to try to assure such viability. It is of course true that not all of the industry's problems are traceable to the defendants' unwillingness to limit enrichment of foreign uranium. Some may be due to lowered expectations for nuclear power. Some are clearly due to the enrichment policies that have been written into the new generic enrichment contract which has been challenged in Count II of the complaint. Though causes of the problem may be several, we hardly expect to hear the defendants argue that there is no point in stopping the bleeding from one wound because the patient may die anyway from his other wounds. The DOE

<sup>1</sup> The DOE in 1984 purported to assess the industry's viability for the year 1983 and reached a conclusion opposite to that published by its Grand Junction Office in 1982. However, that conclusion was based on the bizarre assumption that viability of the industry can be said to increase the more the demand for its product contracts. See discussion *infra* in connection with Count V. The 1983 report does not put in issue any of the underlying industry facts recorded in the attached affidavits.

has a statutory obligation to conduct its enrichment program so as to assure to the extent it can the viability of the domestic industry. The agency clearly is not doing so, and this Court just as clearly has the authority necessary to "compel agency action unlawfully withheld or unreasonably delayed. . . ." 5 U.S.C. § 706 (1982); *Public Citizen Health Research Group v. Aucter*, 702 F.2d 1150 (D.C. Cir. 1983). Defendants should be required to conduct appropriate proceedings, pursuant to a schedule ordered by the Court, for the purpose of adopting criteria for the enrichment of foreign source uranium that will be consistent with the requirements of Section 161(v). Similar relief has been ordered in similar circumstances. *E.g.*, *Assn. of American Railroads v. Costle*, 562 F.2d 1310, 1321-22 (D.C. Cir. 1972); *Sierra Club v. Gorsuch*, 551 F. Supp. 786 (N.D. Cal. 1982); *Mountain States Legal Foundation v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980).

\* \* \* \* \*

#### IV. Conclusion

Plaintiffs are entitled to summary judgment on both Counts I and V. The Court should require DOE to initiate administrative proceedings to develop standards of conduct by which the enrichment program will be administered "so as to assure" the viability of the domestic mining and milling industry. In addition, the Court should set aside the final viability criteria promulgated by defendants under Section 170B since they were promulgated without proper procedures and are, in addition, in conflict with the authorizing statute.

Respectfully submitted this 10th day of July, 1985.

SHAVER & LIGHT

/s/ John H. Licht

JOHN H. LIGHT

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-C-2315

WESTERN NUCLEAR, INC., ET. AL., PLAINTIFFS

v.

F. CLARK HUFFMAN, ET. AL., DEFENDANTS

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION  
FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR  
SUMMARY JUDGMENT AND IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

\* \* \* \* \*

**B. The Secretary Is Vested With Broad Discretion In Implementing Section 161(v) of the AEA**

In Count I plaintiffs allege that the DOE has violated Section 161(v) of the AEA by failing to adopt criteria that would limit the enrichment of foreign source uranium for domestic end use. In plaintiffs' view, restricting the importation of foreign source uranium is necessary to assure the maintenance of a viable domestic uranium industry. Plaintiffs allege additional violations of Section 161(v) in Counts III and IV of their Complaint, asserting that the use of the "fixed tails," "split tails,"<sup>7</sup> and "pre-produced inventory" policies contravenes this statutory provision by arbitrarily discriminating against, and preventing the

<sup>7</sup> Although there is no longer a live controversy with respect to the Count IV allegations involving purported use of a "split tails" policy, the legal arguments set forth herein and in argument IV on other provisions of the AEA apply to this claim assuming, *arguendo*, it is not moot.

development of, the domestic uranium industry. As is conclusively demonstrated by the statute and its legislative history, the DOE is vested with broad discretion in implementing Section 161(v), and there is no mandate under that AEA that the DOE take the action sought herein by plaintiffs.

The relevant portion of Section 161(v) requires that DOE establish criteria placing restrictions on foreign origin uranium *only* "to the extent necessary to assure the maintenance of a viable domestic uranium industry." This kind of language has been read by courts as vesting broad discretion with the agency. *Kerr-McGee Chemical Corp. v. United States Department of the Interior*, 709 F.2d 597, 601 (9th Cir. 1983). ("as the Secretary deems appropriate"). See also *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) ("as he deems necessary"). In this case, the use of deferential language coupled with the obvious congressional intent that DOE is to determine if restrictions will "assure the maintenance of a viable domestic industry" support defendants' position that there is no mandatory requirement to enforce with respect to DOE's administration of Section 161(v).

Careful consideration of the relevant legislative history of Section 161(v) lends further support to the agency's interpretation of this statutory provision. 42 U.S.C. § 2201(v) Section 161(v) of the Atomic Energy Act of 1954) was enacted in 1964 as Section 16 of the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602, and authorized the Atomic Energy Commission "to enter into contracts for producing special nuclear material from privately owned source material as well as enriching privately owned special nuclear material." S. Rep. No. 1325, 88th Cong., 2d Sess.,

reprinted in 1964 U.S. Code Cong. & Ad. News 3105, 3134. Included in § 161(v) was the following provision:

And provided further, that the Commission, *to the extent necessary to assure* the maintenance of a viable domestic uranium industry, shall not offer such [enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States, Provided, that before the Commission establishes such criteria, the proposed criteria shall be submitted to the Joint Committee, and a period of forty-five days shall elapse while Congress is in session. . .

Pursuant to this statutory directive the AEC, in 1966, issued criteria under which enrichment services would be made available. 31 Fed. Reg. 16479 (December 23, 1966). In these criteria, the AEC included a restriction on the use of foreign origin uranium as feed material for enrichment where the enriched uranium is intended for use in a domestic utilization facility. The restriction on the use of foreign origin uranium was intended to be a temporary measure, to help assure the viability of the domestic industry during the transition from the purely government market for uranium defense purposes to a commercial market.<sup>8</sup> It was not until 1974 that the AEC established

<sup>8</sup> See Proposed Modification of Restrictions on Enrichment of Foreign Uranium For Domestic Use: Hearings Before the Joint Committee on Atomic Energy, 93rd Cong., 2d Sess., 4-5 (1974) (Statement



new criteria under which the restriction was gradually phased out over a period of years, resulting in no restrictions after 1983. 39 Fed. Reg. 38016 (Oct. 24, 1974). The criteria addressing restrictions on enriching foreign origin uranium have not been amended or modified since that time.

The pertinent language of Section 161(v) was originally proposed by Kerr-McGee Oil Industries, Inc., a major domestic uranium producer and appearing herein as amicus supporting plaintiffs, during the hearings before the Joint Committee on Atomic Energy on the Private Ownership of Special Nuclear Materials.<sup>9</sup> In support of such language, Mr. McGee testified that "Congress should provide statutory standards to guide the AEC in determining whether to enrich foreign material for domestic use" and that the AEC's "decision that the statutory standard has been met shall be subject to review by [the Joint Committee]." *Id.* at 156. The committee draft included the language substantially as proposed by Kerr-McGee and this provision was enacted into law without amendment.

In the Senate Report accompanying the Private Ownership Legislation, the Committee emphasized the congressional intent to provide the AEC with the utmost flexibility and discretion in its implementation of Section 161(v):

[T]he flexible restriction contained in the Committee bill will allow the Commission to review periodically the condition of the domestic and world uranium markets and to offer enrichment services on a basis

of William A. Anders, Commissioner of the Atomic Energy Commission), appended hereto as Exhibit E.

<sup>9</sup> See Private Ownership of Special Nuclear Materials, 1964, Hearings Before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 88th Cong., 2d Sess. 197-198 (1964), appended hereto as Exhibit F.

which will assure, in [AEC's] opinion, the maintenance of a viable domestic uranium mining and milling industry. S. Rep. 1325, 88th Cong., 2d Sess., reprinted in 1964 U.S. Code Cong. & Ad. News 3105, 3120 (Emphasis Supplied).

Further, in the section-by-section analysis of Section 161(v), the Committee states:

The direction to the Commission not to offer services under this subsection for uranium of foreign origin is flexible both as to the duration and degree of the restriction. . . . Accordingly, the language of the bill will permit the Commission to survey periodically the condition of the domestic and world uranium markets and to offer or refuse to offer its enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium industry. *Id.* at 3135. (Emphasis supplied).

Clearly, Congress, in enacting Section 161(v), intended the Commission (now DOE) to have full discretion to determine whether or not restrictions should be placed on enrichment of foreign origin uranium, subject only to review and oversight of the cognizant congressional committees.<sup>10</sup>

The fact that Congress has considered, and rejected legislation which would have required *mandatory restrictions* on importation of foreign origin uranium provides

<sup>10</sup> Under § 161(v), the criteria containing the agency's policy decision regarding restrictions on enrichment of foreign origin uranium or the withdrawal of such restrictions must be presented to the cognizant congressional committees 45 days prior to the date such criteria becomes effective. The purpose of the "lay and wait" procedure is to permit Congress to enact a statute requiring different agency action. *Consumer Energy, etc. v. F.E.R.C.*, 673 F.2d 425, 474 (D.C. Cir. 1982).

further evidence that the DOE's discretion in this area is not subject to judicial review. In 1982, Senator Domenici questioned the Department of Energy's policy of permitting the enrichment of foreign origin uranium for use in domestic facilities, and introduced an amendment to the Nuclear Regulatory Commission Authorization Act which would have required the NRC to issue criteria restricting the importation of source material and special nuclear material. 128 Cong. Rec. § 2968-2970 (daily ed. March 30, 1982). The conference committee that considered the amendment changed the language substantially, and the conference bill contained a proviso which would have required the Secretary of Energy, when foreign uranium imports reached a level of 37.5%, to revise its enrichment criteria "so as to encourage the use of domestic origin uranium in domestic nuclear powerplants." 128 Cong. Rec. S 13054 (daily ed. Oct. 1, 1982) (Remarks of Senator Dominici); *See also*: 128 Cong. Rec. H 8803 (daily ed. Dec. 2, 1982) (Remarks of Rep. Udall and Rep. Lujan).

Even this provision, however, was rejected by the House of Representatives, *Id.* at H 8809, and a substitute provision was agreed to by both House. 128 Cong. Rec. S15316. (daily ed. Dec. 16, 1982). In the substitute measure,<sup>11</sup> Congress deleted all references to mandatory restrictions on importation of foreign origin uranium and, instead, required, *inter alia*, the Secretary of Energy to *request* the Secretary of Commerce to initiate an investigation pursuant to 19 U.S.C. § 1862 if uranium imports from executed contracts or options are projected at a level of 37.5% for a two-year period. To date, the uranium imports or projections on future imports have not reached these levels for a two-year period. *See* 1984 Viability Determination, Exhibit B.

<sup>11</sup> The substitute provision is codified at 42 U.S.C. § 2210b.

Plaintiffs would have this Court rewrite the statutory provisions and impose the mandatory criteria that Congress has already rejected under which enriching services may be performed. Indeed, plaintiffs are requesting the Court, *inter alia*, (1) to require DOE "to adopt criteria relating to enrichment of foreign-source uranium for domestic end use sufficient to assure the maintenance of a viable domestic uranium industry;" (2) "to prohibit DOE from enriching foreign uranium for domestic end use—pending adoption of limitations upon enrichment of foreign uranium;" (3) to prohibit DOE from implementing a "fixed tails" policy in its enrichment contracts; and (4) to prohibit purported sales of foreign-origin uranium from the Government's stockpile—all factors concerning the terms and conditions under which uranium enriching services may be provided, including restrictions on the contracts of foreign origin uranium in domestic utilization facilities.<sup>12</sup> Such action is contrary to the broad discretion vested in DOE to determine whether these restrictions are indeed necessary to assure domestic viability.

As defendants have shown above, Congress intended the agency to have great flexibility in making a determination whether or not to impose restrictions upon the enrichment of foreign origin uranium for use in domestic reactors, and, further, to establish criteria containing the terms and conditions under which enrichment services may be offered. Here, the DOE acted within its discretion under the legislative framework and has not reimposed restrictions on the enrichment of foreign source material. Review of this grant of authority is performed by the cognizant congressional committees. Of course, if Congress determines that the agency's actions are not in accord

<sup>12</sup> *See* Complaint pp. 24-25.



with its desires, it can take the legislative action it determines is warranted.<sup>13</sup>

Since Congress has expressed its clear intent to leave the question of placing restrictions on foreign origin uranium to agency discretion by refusing to enact any mandatory guideline for such restrictions, it would be inappropriate for this Court to legislate this change by granting plaintiffs the relief they seek. *American Dredging Co. v. Local 25, Marine Div., Int. U. Op. Eng.*, 338 F.2d 837, 850 (3d Cir. 1964); *In re Knight Realty Corp.*, 370 F.2d 624 (3d Cir. 1967), *rev'd on other grounds* 391 U.S. 471. See *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 706 (D.C. Cir. 1971), (court held that positive action by Congress rejecting limiting amendments is a clear sign of Congressional intent), see also *Liberty Mutual Insurance Company v. Horton*, 275 F.2d 148, 153 (5th Cir. 1960), (it is the function of the judiciary to construe the language of the statute, and not to legislate). Thus, the plaintiffs may not maintain an action where the only relief that may be granted would result in judicial legislation.

Additionally, even though the Secretary has issued a determination of nonviability pursuant to Section 170B of the AEA, this determination does not impose any additional duties on defendants under 161(v).<sup>14</sup> Further, plain-

<sup>13</sup> See for example, proposed amendment H.R. 3257, 99th Cong., 1st Sess. (1985). H.R. 2094, 99th Cong., 1st Sess. (1985) and Senate Resolution S. Res. 183, 99th Cong., 1st Sess. (1985). These bills clearly evidence that Congress is actively monitoring DOE's actions.

<sup>14</sup> The Secretary has referred the question of causation and possible curative actions in the form of import controls to the U.S. Trade Representative because, in the Secretary's view, his expertise and the expertise of other Executive Branch agencies charged with international trade jurisdiction makes the trade representative and these agencies the most appropriate forums for consideration of this complex

tiffs have cited no factual support for the position that the imposition of controls on source or special nuclear material of foreign origin would "assure the maintenance of a viable domestic uranium industry." To the contrary, plaintiffs' acknowledgment that the domestic uranium industry is depressed in part because of "lowered expectations for nuclear power" and the large inventories of uranium that have accumulated because of this decrease in demand is evidence that restricting imports could not assure the maintenance of a viable domestic uranium industry. Plaintiffs' Memorandum In Support Of Summary Judgment at 13 and 18.

Finally, although plaintiffs do not address it in their motion for summary judgment on Count I, they allege in their Complaint that DOE has "a duty to request the Nuclear Regulatory Commission (NRC) to implement restrictions on the importation of enriched uranium pursuant to Sections 53 and 69 of the Atomic Energy Act, 42 U.S.C. §§ [2073] and 2099. . . ." Complaint D, ¶ 16. These statutory provisions relate solely to licensing for imports and, as such, impose no affirmative duty on the Secretary as suggested by plaintiffs. For this reason, plaintiffs fail to state a claim upon which this Court may grant the relief requested.

The licensing provisions of 42 U.S.C. §§ 2073 and 2099 were transferred to the NRC under Pub. L. No. 93-438, Oct. 11, 1974. 88 Stat. 1233. The NRC, an independent regulatory agency, has the authority to license or prohibit the licensing of importation of source or special nuclear material only where such action is based upon considerations of the common defense or the health and safety of the public. The NRC has no authority to regulate import

problem. See Letter to Clayton Yeutter from John S. Herrington, Exhibit B.



licenses to preserve the mining industry's economic health—the factual predicate of plaintiffs' request. Thus, even if DOE had a statutory obligation to request the NRC to implement these restrictions, there is no legal basis for the NRC to act. For these reasons plaintiffs have no cause of action against defendants under 42 U.S.C. §§ 2073 or 2099.

\* \* \* \* \*

THE SECRETARY OF ENERGY  
WASHINGTON, D.C. 20505

September 26, 1985

MEMORANDUM FOR The President

Pursuant to the requirements set forth in section 170B of the Atomic Energy Act of 1954, 42 U.S.C. 2210b, I am transmitting the annual determination of the viability of the domestic uranium mining and milling industry.

Section 170B directs me to make an annual determination for the years 1983 to 1992. The attached determination covers calendar year 1984. The determination has been made in accordance with the criteria established by regulation (10 C.F.R. §§ 761.1-.8 (1984)). The annual assessment of the industry's condition, prepared by the Energy Information Administration, is also attached. This study, "Domestic Uranium Mining and Milling Industry: 1984 Viability Assessment," September 1985, provides the underlying information and analysis for this determination.

I have determined, in accordance with the provisions of the Act and the regulations, that for calendar year 1984 the domestic uranium mining and milling industry was not viable. In view of this determination, I have authorized the Department of Energy to offer its customers for enriched uranium an option that, if exercised, could have the effect of increasing domestic uranium sales. I have also directed the Department to postpone for one year a plan to feed some of its own uranium stockpile into enrichment plants.

In addition, I have requested the United States Trade Representative to examine this situation with a view to determining the appropriate available courses of action

under U.S. trade laws. The Trade Representative has been requested to provide preliminary recommendations within three months.

/s/ John S. Herrington  
JOHN S. HERRINGTON

Attachments

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-C-2315

WESTERN NUCLEAR, INC., ET. AL., PLAINTIFFS

v.

F. CLARK HUFFMAN, ET. AL., DEFENDANTS

REPORTER'S TRANSCRIPT OF MOTIONS HEARING

Proceedings before the HONORABLE JIM R. CARRIGAN, Judge, United States District Court for the District of Colorado, beginning at 1:33 o'clock p.m., the 5th day of June 1986, in Courtroom C203, United States Courthouse, Denver, Colorado.

APPEARANCES:

The plaintiffs appearing by their attorneys, Shaver and Licht, by HARLEY W. SHAVER, Esquire, 1212 Century Towers, 720 South Colorado Boulevard, Denver, Colorado 80222-1934; and Covington and Burling by PETER J. NICKLES, Esquire, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044;

The defendants appearing by their attorneys, MARYANN CLIFFORD, Esquire, Department of Justice, Civil Division, Room 3728, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530; I. A. FINGERET, Office of General Counsel, Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585; and [2] STEPHEN D. TAYLOR, Esquire, Assistant United States Attorney, Twelfth Floor Federal Office Building, 1961 Stout Street, Denver, Colorado 80294;

WHEREUPON, the following proceedings were held:

\* \* \* \* \*

[3] **PROCEEDINGS**

THE COURT: Please be seated.

Good afternoon, Counsel,

This is 84-C-2315, Western Nuclear, Inc., et al, vs. F. Clark Huffman, et al, which comes on for hearing of all pending motions today.

Will counsel please enter their appearances for the record? Plaintiff first.

MR. SHAVER: Good afternoon, Your Honor. My name is Harley Shaver of the firm of Shaver and Licht, on behalf of the plaintiffs. Counsel with me is Peter Nickles of Covington and Burling on behalf of the plaintiffs and amicus Uranium Producers Association.

THE COURT: Has he been admitted for purposes of this case?

MR. SHAVER: Yes, Your Honor, he has.

THE COURT: Thank you very much.

MR. TAYLOR: Good afternoon. My name is Stephen D. Taylor, Assistant United States Attorney.

And I would like to introduce Maryann Clifford. She is with the Department of Justice, the Civil Division of Field Programs. She is admitted to the Bars of Maryland and D.C.

Sitting on her right is Dave Thomas, he's Deputy director of the Enrichment Operations for the Department of Energy. And sitting across from Ms. Clifford is Averum Fingeret, who is the [4] General Counsel for the Department of Energy.

THE COURT: Would you mind, Mr. Taylor, please giving me that last name again?

MR. TAYLOR: Averum Fingeret, and he's from the Office of General Counsel, I'm promoting him unintentionally.

THE COURT: There are, as I'm sure you know, several motions pending, they are substantial motions.

For the record, so that things are clear, in the event of an appeal, on September 19, 1985, I entered an order which granted the plaintiff's summary judgment on the Count Two. This complaint, for some reason identifies the claims as counts, as in a criminal indictment, so we are going to call them counts rather than claims. But you can call them anything you want to.

So that left the remaining aspects of the summary judgment motions, motion to dismiss and cross motions for summary judgment, pending. I would like to take them in the order of count numbers that are set out in the complaint, except as to each count I would like to hear and consider first the defendants' motion for a stay of proceedings as I want to consider that separately as to each count, because I think the grounds are different for the various counts, and the reasons involved are different. So we will hear counts—matters directed to Count One first, and then we will proceed to Count Three.

MR. TAYLOR: Your Honor, just as a housekeeping matter, may I be excused?

[5] THE COURT: Yes, you may, Mr. Taylor.

MR. TAYLOR: Thank you.

MR. NICKLES: Your Honor, may it please the Court, my name is Peter Nickles appearing both on behalf of the plaintiffs and on behalf of the Uranium Producers Association, and I have allocated responsibility with Mr. Shaver to take Count One.

I might tell the Court at the outset that this count, in our view, is really the heart of this case, and we present it with some sense of urgency. It asks the Court, in effect, to apply what we perceive to be the clear mandate of Section 161(v) of the Atomic Energy Act. In our view, Your Honor, this is a simple question of statutory interpretation. The arguments raised by the defendant as to lack of



reviewability, lack of implied right of action, have already been resolved by this Court.

THE COURT: You may proceed.

MR. SHAVER: Thank you, Your Honor.

This Court has already resolved and rejected the principal arguments of the defendant as to lack of reviewability and lack of cause of action, so to speak, when it decided Count Two. The same arguments were raised there. The Court's resolution of those arguments represent the law of the case. So we are confronted with a straightforward question and that is whether under 161(v) the Department of Energy, as the successor to the Atomic Energy Commission, is mandated to take certain actions or has discretion to take whatever action it should choose.

[6] I would like to read, Your Honor, the particular language that is the focus of our summary judgment motion. The language is, "Provided further that the Commission, now the Department of Energy, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services," those are enrichment services, "for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States."

Now, it is our position, as the plaintiffs, that inasmuch as the Department of Energy has already declared formally under a different provision of the Atomic Energy Act that the industry, the domestic uranium industry, is not viable as of calendar year 1984.

THE COURT: Let me stop you right there.

Does the government dispute the fact of nonviability of the industry at this time?

MS. CLIFFORD: Your Honor, as to 1984, calendar year 1984, the finding would be September of 1985 they

are not viable is not disputed. I cannot speak for the department as of today, although —

THE COURT: Has there been any finding that it is resuscitated?

MS. CLIFFORD: No, Your Honor.

THE COURT: So it was found to be dead, at least non-viable?

[7] MS. CLIFFORD: Particularly under Section 171(b) of the Atomic Energy Act.

THE COURT: And there has been no finding to the contrary since then so I suppose we can assume that it's still not viable?

MS. CLIFFORD: The Secretary will be required, within the next year, to make another viability determinations, by statute, that will be done by September.

THE COURT: So we are still operating on the one that was done as to the year 1984?

MS. CLIFFORD: That's correct.

THE COURT: All right.

Thank you very much, Ms. Clifford.

MR. NICKLES: I might say, Your Honor, that the record contains affidavits, and, of course, the amicus present situation that the states of which only the affidavit from the Secretary of Energy from the State of New Mexico attesting to the date as of the date of those affidavits that the industry was sinking even further on this prior low situation. So we start with what is undisputed and that is that the industry is not viable. The statute says that the DOE shall not offer its enrichment services to foreign source uranium, if, in fact, the industry is not viable. We say that there is a mandate the Department has ignored, continues to ignore. Indeed, Your Honor, in the current rulemaking, which the Department cites as the basis for staying action by this Court, the Department continues to take the [8] position that it should not do anything under

Section 161(v), not because it disputes the fact that the industry is nonviable but because principally it believes it would be untoward effects on its enrichment enterprise.

And so what has happened, Your Honor, and we see this in the record, not only in the briefs of the Department of Energy but in the briefs filed by the utilities, that rather than accepting what Congress has already directed, the Department believes it has infinite discretion to decide for itself, in light of enrichment enterprise and what it perceive to be all the causative factors respecting the potential ultimate demise of the industry, that it can do nothing.

Now, the Court will recall that this industry is a creature of the federal government. For years this industry depended on the fact that the government was purchasing its product, and so it developed many entities in this industry. Accordingly, when the government saw in 1964, that it should create a civilian industry, it enacted in 161(v) a protective mandate, which said to the Atomic Energy Commission, as government purchases phase out and as the civilian industry grows. You must assure, to the extent necessary, the maintenance of a viable domestic uranium industry. And then in 1974, Your Honor, as the Atomic Energy Commission, and then successor, saw that the industry was growing and profiting, it developed a schedule for phaseout of the 100-percent preclusion of enrichment of foreign [9] source uranium, looking in 1983 to a situation where there would be no preclusion of the enrichment of foreign source uranium and that was the situation in 1984. And what has happened since that time is that the industry is flat on its back.

Now, Your Honor, we have set forth at great length in our briefs the legislative history leading to this statute 161(v), the national security interest that the Congress had in mind when the it saw to it that this industry, this civilian

nuclear industry, would be created, and there were hearings, Your Honor, at the time the schedule for phaseout was enacted by the Commission.

And there is one quote, Your Honor, that is particularly apropos that I would like to briefly read to the Court, that is the quote from Commissioner Andres of the Atomic Energy Commission, who of testified in 1974, when this was before the Congress, the schedule for phaseout of the restriction, Commission Andres said to Congress, "Should there be any indication that the proposed schedule is endangering domestic industry viability, U.S. self-sufficiency or our national security, the Commission will reimpose restrictions or take such other steps as might be appropriate."

So we speak to the Court with a great sense of urgency. We need the Court to tell the Department to do its duty under the statute. What does the Department say in response to what appears; at least to the plaintiff, to be the clear mandate of 161(v)? First, the government says there is no right of action. [10] That is wrong. The Court held it was wrong, and specifically, Your Honor, Section 181 of the Atomic Energy Act specifically incorporates the provisions of the Administrative Procedure Act, and we are seeking to have the Court direct that agency action unlawfully withholding it be implemented.

The government also says that there is a prohibition on this type of action under Section 221 of the Atomic Energy Act, which precludes suits against individuals for violations of the Act. This is not that situation. This is a suit against the Department for failing to fulfill its statutory mandate. And the Court accepted those arguments when it decided in September of 1985 Count Two.

The Department also says to the Court, look at section 170(b), that was enacted in 1982, because somehow that supersedes or changes the mandates of 161(v), and, as I



understand the argument, it is, Your Honor, that under 170(b), the Department is directed, its secretary is directed to make these annual findings of viability and even though the same word "viability" is used in both 170(b) and in 161(v), they may mean different things. And that even though under 170(b) there is a finding of nonviability, all that's supposed to happen is there to be a reference over to the United States Treasury representatives.

Now, there is absolutely, Your Honor, no indication anywhere in the statute that somehow Congress had in mind a change in the mandate of 161(v). The Department's argument seems to lie [11] in its reading of various aspects of the legislative history. And on that point, Your Honor, I'd like to read to the Court a statement that Senator or Domenici, the chief sponsor of the 170(b) legislation submitted to the Department of Energy, about two months ago in connection with the Department's rulemaking. Senator Domenici says, "There are two specific points in the Department's analysis which relate to the legislative history of Section 170(b) of the Atomic Energy Act. These are the amendments made at my urging to the Atomic Energy Act. First, the Department claims that the Congress specifically rejected legislation requiring mandatory restrictions on imports. That is not accurate. The Senate passed such restrictions and the House never considered the same proposal. A conference of House and Senate members debated the issue for nine months and in the end, after rejecting the Senate proposal by one vote the conferees settled on a different approach. The key to the compromise, as it was finally passed, was that the Secretary of Energy was required to make an annual finding of viability relating to the mining industry. This brings me to the second point of inaccuracy in the Department's legislative analysis. The Department believes," this is what they have argued to this Court, "that this annual finding is unrelated

to the statutory requirement that the Department maintain the viability of the mining industry. This is an absurd view. Throughout the legislative history of these amendments, I made clear that the need for this annual finding was dictated by [12] the fact that the Department had failed to investigate the viability of the industry since 1973." That was the time period, Your Honor, when the Atomic Energy Commission adopted this schedule for phaseout of the 100-percent restriction. "The department has now made that finding," of nonviability, "and has discovered the obvious, that is, that the industry is not viable. The Department has failed to act as required by law, however, and I believe that, as I stated earlier, that this is principally out of self-interest."

There is no argument, the Department is seeking to enhance its enrichment empire at the cost of the industry, which is in despair. The only discretion, if there is any discretion, is for the Department to show, by a rulemaking, that there is some reason to permit something other than 100-percent domestic requirements, so to speak, that is a complete preclusion as there was back in 1973 when the industry was in much better shape than it is today, 100-percent preclusion of enrichment of foreign source uranium. And one does not avoid that mandate, Your Honor, by arguing policy matters to the Court. Those policy matters can be addressed to Congress, if the Department wishes. The Congress has spoken, the Congress had mandated action.

Your Honor, we have requested, as a matter of summary judgment, in fact, in effect, three separate prongs of relief. Number One, we believe, in light of the despair and urgency of the matter, that the Court should direct that the Department [13] immediately impose the 100-percent restriction on enrichment of the foreign source uranium that existed prior to the adoption by the Atomic Energy



Commission in 1974 of the phaseout. There is no question as to the nonviability of the industry, there is no question as to the need urgently and immediately to do something to save it before the disappears entirely. This is completely attested to by the affidavits from New Mexico and Wyoming and by the defendants' own analysis.

Number Two, we ask that the Court order that the Department immediately commence a rulemaking under 161(v) and announce within 30 days if, and the basis for, any view that the Department may have that the preclusion for the indefinite future should be anything other than 100 percent. And, in our view, there can be no basis, absolutely no basis, to impose anything other than a complete preclusion on the enrichment of foreign source uranium.

THE COURT: What's the second item of relief that you are seeking?

MR. NICKLES: Your Honor, the second item of relief is that the Department would be ordered within 30 days to issue a notice of proposed rulemaking and in that notice to explain why if there is any basis for the Department to believe that there should be imposed for the indefinite future as a rule under 161(v), something less than a 100-percent preclusion on the enrichment of foreign source uranium. In other words, we believe, as of the [14] date of the issuance of the Court's order, there should be imposed a 100-percent preclusion as there was for many years prior to 1974, because of the urgency of the matter there is authority to do that, there is a necessity to do that.

Secondly, the Department should be ordered, within 30 days, to propose a rule that will bind it with regard to its enrichment services and to explain in a rational basis why that hundred-percent immediate preclusion should not be extended indefinitely.

And, finally, the defendant should announce within 90 days a final rule that will give the industry a basis upon which to plan the resuscitation of its future.

Your Honor, this is a matter of great importance, of great urgency, the facts are compelling, the statute is mandatory, the Department is hiding behind issues of standing, reviewability, issues that the Court has rejected.

I thank the Court for giving us this argument, and I impress upon the Court the need for immediate action.

That's all I have at this time.

THE COURT: Very well.

Thank you very much.

Ms. Clifford, do you wish to be heard as to Count One, or the defendants' motion for stay as to Count One?

MS. CLIFFORD: Yes, Your Honor.

Thank you.

[15] Your Honor, defendants, in this case, agree that the case and the heart of the matter of plaintiffs' complaint is whether or not the Department of Energy should be required to institute restrictions on the enrichment of foreign source uranium. However, Your Honor, while we agree, and, in fact, have found that for calendar year 1984 the industry was not viable, we agree that they are financially troubled. However, we do not agree that placing the kinds of restrictions that they are asking, particularly their request for injunctive relief, would give them any of relief that they seem to feel it would provide them.

Your Honor, while counsel—

THE COURT: Isn't that a matter that you should address to Congress and get the—don't you have an obligation under the present statute that requires that—

MS. CLIFFORD: No, Your Honor, we don't.

THE COURT: —that requires you do everything you can to make the industry, the domestic industry, viable?

MS. CLIFFORD: Your Honor, the statute being interpreted by the Secretary and I think on its fact it's clear, that the—that 161(v) of the Atomic Energy Act permits and indeed requires the Secretary to make a determination in, the first instance, whether or not imposing restrictions or enrichment would provide any benefit to the industry.

Your Honor, I would like to point out—

THE COURT: Where would you—would you point that out [16] in the statute for me, please?

MS. CLIFFORD: Your Honor, the language of 161(v) states that, and I quote, that the Commission, to the extent necessary, to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source of special nuclear materials of foreign origin intended for use in the utilization within the jurisdiction of the United States. Your Honor, plaintiffs have relied on the word "shall" as being mandatory, and we agree it's—we don't dispute the fact that "shall," itself, normally interpreted as being a mandatory term. However, the clause prior to that requires the Secretary make a determination as to whether or not those kinds of controls would assure or intend to assure the maintenance of a viable domestic industry. Curiously, plaintiff has cited the urgency of the matter, and yet they have made no attempt to demonstrate that these enrichment restrictions would help them at all. I think the paper that the amicus filed with Your Honor, the amicus utility company, demonstrates clearly that the harm would befall them, would befall consumers of nuclear power, of energy, would befall the Department of Energy, we do not dispute that.

Your Honor, if I may, by way of background, at the time Section 161(v) was enacted in—

THE COURT: What you are saying it's in the economic interest of the power industry to be able to use foreign source uranium, is that your point?

[17] MS. CLIFFORD: Your Honor, that is not necessarily it unless there is economic interest and it's disputed.

THE COURT: That's why they have got an interest in this lawsuit?

MS. CLIFFORD: They have an interest in this lawsuit because if an injunction were entered, many of these utilities have entered into contracts, long-term contracts, to purchase foreign uranium, and if they remained under those contracts and were unable to bring it to the United States to enrich it here, they would be left with a difficult decision of taking that uranium and having it enriched overseas, which they are able to do, at prices probably less than they could have it done in this country. But at the same time they have contracts with the Department of Energy, long-term contracts, to have their uranium enriched here. Your Honor, there is a real dilemma and that even Congress has recognized in that the bills that have been—that are before Congress now, even, provide that the contracts in existence for the purposes of foreign uranium would be grandfathered in, and that's why the injunctive relief, the injunctive aspect of plaintiff's claim.

THE COURT: There is no such statute now?

MS. CLIFFORD: Pardon me?

THE COURT: There is no such statute?

MS. CLIFFORD: No. There are only bills pending before Congress. There have been numerous bills over the years.

[18] Your Honor, the reason, one of the main reasons, that 161(v) is not workable in today's marketplace—

THE COURT: Are we talking about 42 U.S. Code, Section 2201(v)?

MS. CLIFFORD: That's correct, Your Honor.

THE COURT: Would you mind referring to it in that form? I don't have the Act in the original form in front of me. If you give me citations, it would help if you give me



U.S. Code citations. Judges don't wander around dealing with the original sections and acts, they deal with the Code. We don't even have time to deal with the sections often enough.

MS. CLIFFORD: Your Honor, at the time that 2201(v) was enacted in 1964, there was nowhere else for the utilities to go to have the uranium enriched outside of the Soviet Union. We had a monopoly on enrichment at that time, so the restrictions that the Department of Energy, or at that time the Atomic Energy Commission, had available to it was meaningful, it's not meaningful in this marketplace, we submit, Your Honor, and —

THE COURT: Isn't the remedy to get the statute amended? I have got to follow the statute as it exists, not as it might be bettered.

MS. CLIFFORD: Your Honor, as it exists, we submit that there is discretion to the Secretary to determine whether or not —

THE COURT: Would you help me find that in 2201, please? [19] I'm just not following that argument.

MS. CLIFFORD: Your Honor, we submit that the language that the—to the extent necessary to assure the maintenance —

THE COURT: Can you tell me just exactly, is that in (v), capital A, or capital B, or what?

MS. CLIFFORD: Your Honor, I just don't have that section with me but it's in 2201(v), I believe it is the italicized clause there that begins "That the Commission."

MR. NICKLES: Your Honor, under Capital B, as in boy.

THE COURT: "Provided that the Commission, to the extent necessary, to assure" and so forth, is that what you are talking about?

MS. CLIFFORD: That's correct, Your Honor.

It is our contention, Your Honor —

THE COURT: Let me read it first, please.

It says, the language you are talking about says, "And provided further that the Commission, which would have dealt with the Atomic Energy Commission and now deals with the Department of Energy, we can concede that —

MS. CLIFFORD: That's correct.

THE COURT: —to the extent necessary to assure the maintenance of a viable domestic uranium industry, not offer such services for source or special nuclear terms of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States." That's the language to which [20] you refer?

MS. CLIFFORD: That's correct, Your Honor.

THE COURT: And would you help me understand what it is in that that gives the Commission discretion?

MS. CLIFFORD: Well, Your Honor, it's our view and we believe that it's buttressed by the legislative history on that provision which is cited in Exhibit E and A to our original motion for summary judgment. That language of the legislative history interpreting that language states that it is to be a flexible restriction, and that the Secretary is to exercise his or her opinion. And it is our view that Congress intended that because of the complexities of making this kind of determination and the impact it would have that the Secretary necessarily would be vested with discretion to determine whether this kind of restriction would, in fact, tend to assure or would assure the maintenance of a viable domestic industry.

Your Honor, we are not saying that viability means one thing in 170(b) and that it means a different thing in 2201(v), rather we are saying that the Secretary has made a determination that these restrictions would not help the industry, and, in fact, would harm others, and in the long run would —



THE COURT: Those are all—those are just policy arguments. I'm not a policy-making board or I'm not in Congress, I'm simply trying to figure out what the law says so I can follow it, that's what I'm sworn to do. To me it says that the agency, [21] the Department of Energy, shall not offer such services for source or special nuclear materials of foreign origin—period. In effect, I don't see how there is any discretion in that language.

MS. CLIFFORD: Your Honor—

THE COURT: How could it be any clearer than saying "shall not offer?"

MS. CLIFFORD: Because, Your Honor, of the clause there which provides that there must be a determination that it will assure the maintenance of a viable domestic industry. Your Honor, we submit that the preliminary finding of the Department of Energy is that it will not.

Perhaps, Your Honor, at this point I should address myself to the stay because I think that the fact that the Court is being asked, in the first instance, to interpret a statute that the Secretary should interpret in the course of rulemaking, plaintiffs, have, in fact, asked for rulemaking in their complaint. The Secretary has instituted a rulemaking—in January of this year rulemaking was instituted, establishing new proposed criteria under this section of the Act. The record is now closed on that rulemaking, Your Honor, and the defendant is making every effort to proceed expeditiously to issue a final rule and to lay that final rule in front of Congress for the 45 days required by statute.

We submit, Your Honor, that it would not give effect to the provisions of 42 U.S.C. 2201(v) if this Court were to rule [22] prior to completion of the rulemaking, and an opportunity for Congress to determine whether action is needed.

THE COURT: How long has this case been pending? How long? We have given the agency a long time to act, it seems to me.

MS. CLIFFORD: Your Honor, the case has been pending—

THE COURT: Since—

MS. CLIFFORD: Quite some time.

THE COURT: It was filed in 1984.

MS. CLIFFORD: Pardon me, Your Honor?

THE COURT: It was filed in 1984. I can look up the complaint. Would you give me the filing date?

MR. SHAVER: December 7th, 1984.

THE COURT: So you have had a year and a half to proceed with the rulemaking, or anything. It takes as long to do that as it takes to appoint a Federal Judge in Colorado, I guess.

MS. CLIFFORD: Obviously part of the rulemaking which deals with the Count Two criteria that was the subject of your decision in September.

THE COURT: Right.

MS. CLIFFORD: As well as the fact that—

THE COURT: That's primarily what it's addressing, isn't it?

MS. CLIFFORD: It primarily addresses the Count Two criteria, although it does address Count One very explicitly. The [23] parties have commented on the question of enrichment restriction.

THE COURT: Isn't this a question that really needs to be settled one way or the other and isn't it one way to get it settled to precipitate some action by somebody, the agency or Congress or somebody, to go ahead and decide these motions and get them out of the way, at least then you have got a case on appeal and you have got some incentive for the agency and for Congress to make I'm their minds and take some action.

MS. CLIFFORD: Your Honor—

THE COURT: I don't care if I'm held to to be right or wrong, I'm going to call it the way I think is right. But it seems to me there would be much more incentive to get both the agency and Congress off the dime if we acted and went ahead and decided these motions.

MS. CLIFFORD: The agency is acting, as I indicated, we are acting promptly in this rulemaking. The matter is now before them, they have every intention—

THE COURT: When will there be a rule?

MS. CLIFFORD: The information available to me is that the agency is making every effort to have a rule out within the next month or so but, of course, it must then, according to the statutes, lie before Congress and I submit Your Honor that that is a very important consideration because Congress then would have the opportunity, if it feels that the agency has not acted in compliance with its intent under that provision, it would then [24] have the opportunity to legislate and we submit that that is the proper forum for consideration of any kind of restriction of this magnitude.

THE COURT: Well, this particular practice of seemingly unrestricted enrichment of foreign uranium is not, it seems to me, it's so contrary to the clear language of the statute. I don't see how rulemaking is going to cure it. How is that affected by any criteria that could be adopted?

MS. CLIFFORD: Your Honor, the restrictions must be in the form of criteria. This provision, provision 2201(v), provides that any restrictions that the Department does impose, and if, in fact, this Court were to find that the Department must consider restrictions, the proper vehicle for that would be a rulemaking. There would have to be notice and comment and again there would have to be an opportunity for Congress to consider the final criteria, that acknowledges the statutory scheme, and it is for that

reason that—that is one of the reasons why an injunction which would require the Department immediately to not accept foreign source uranium for enrichment would create an incredible problem for the numbers of utilities that now are under contract.

THE COURT: At the reason for that is, because, as you say, the historical facts have intervened and have changed the underlining situation on which the original statute was based, thus making the statute obsolescent, is that the basic legal argument?

[25] MS. CLIFFORD: No, Your Honor, I don't think—I'm not saying that the statute is obsolete, I'm saying, however, that one of the considerations that was not a consideration in 1964 is that there are others out there that are enriching uranium and they are enriching uranium at costs less than the Department of Energy can—is charging for it because the Department is required, under statute, to recover its costs.

THE COURT: And because that's going on I don't need to do what the statute says?

MS. CLIFFORD: No, Your Honor.

THE COURT: See, the thing that bothers me is that these are all very valid arguments and should be addressed to the Congress because they basically bear on whether the statute ought to be amended but they don't bear on whether I have got a duty to follow the statute as Congress has written it.

MS. CLIFFORD: Your Honor, they will be addressed to Congress when the rulemaking lies in front of Congress. Congress will have an opportunity to review those reasons which are set forth in the preliminary rule, the Department of Energy has identified those reasons as rational for not imposing restrictions. And, in fact, Congress has considered this before, there have been bills before Congress, as we noted in our brief, in 1982, and when Section 170(b)

of the Atomic Energy Act was passed, there were several bills before Congress at that time.

THE COURT: Did they address this issue?

[81] MS. CLIFFORD: Pardon me, Your Honor?

THE COURT: Did those bills address this issue?

MS. CLIFFORD: They addressed the issue of whether or not there should be mandatory strikes.

THE COURT: Did they pass?

MS. CLIFFORD: And they did not pass, Your Honor.

And we submit that again in looking at the statute the Court is charged with not just looking at the plain language of the statute, but also looking at other factors such as legislative history.

THE COURT: That particular history would tend to indicate that Congress is less likely to reject the present statute, doesn't it?

MS. CLIFFORD: Perhaps, Your Honor, that would indicate then that Congress agrees with the section interpretation of the statute, that if it cannot assure the viability of the domestic uranium industry, that there is no requirement that they try by placing controls on, that would only harm others and not perhaps benefit the domestic industry. We submit, Your Honor, that, and again we cited the case of Red Lion Broadcasting in our papers, which indicate that it's relevant in considering legislative history as to whether or not Congress has had before it other statutes that basically comport with a agency's interpretation of the statute, and in this case that is so, and Congress is aware of the Department of Energy's position and has not acted. And we [27] submit that that's an indication that our interpretation of the statute is correct.

THE COURT: Or it might be a indication Congress has not had time to get to the job.

MS. CLIFFORD: Your Honor, I can't —

THE COURT: Maybe in our system of priorities this isn't as high as it ought to be. I hope you understand my

concern here because I don't feel that the policy arguments really are arguments that I can take into account.

MS. CLIFFORD: I submit they are not policy arguments but certainly it is relevant to the Court to examine the interpretation of the statute given to it by the party charged with interpreting it in the first instance and that also the Secretary in this case, and determining whether it's reasonable or logical.

THE COURT: That all goes to the injunction aspect, certainly because it's a matter in equity.

MS. CLIFFORD: Not just to the equities, Your Honor, which we submit are all on the defendants' side, with no indication that an injunction would do anything to benefit the plaintiffs, or certainly not when weighed against the harm to all other parties. But we submit, Your Honor, it goes to the interpretation as well, that the Court should look at the Department's interpretation of the statute and should look at the legislative history and what Congress has done, or chosen not to [28] do, since 1964, when this particular provision was enacted.

THE COURT: If the Court were to grant declaratory relief without an injunction, do you think that might get any more action so that this matter can get resolved whether it ought to be resolved, by the Congress?

MS. CLIFFORD: Your Honor, I don't believe that that would result in resolution necessarily by Congress, since —

THE COURT: Do you think it might get some rules out?

MS. CLIFFORD: Your Honor, the rulemaking has — is out. It is not clear whether or not the agency will change its mind from the proposed to the final rule, it is considering the comments, I submit that the agency is acting consistent with the statute at this point.

That's all I have, Your Honor, on that point.

THE COURT: Very well.



Thank you very much.

Anything further on that matter?

MR. NICKLES: Your Honor, with respect to the rulemaking, counsel has failed to tell the Court that the Department has announced in that rulemaking that it is proceeding on the legal foundation that it has discretion under 161(v), so we go back in the circle, and when the Department, about a month, ago issued notice that it was going to extend the period of comment for an additional 30 days on one matter, they reaffirmed their position under 161(v), that there should be absolutely no restrictions on [29] foreign source uranium enrichment. So it's not as if the rulemaking is going to obviate the problem because the Department is proceeding on the mistaken legal basis that this Court needs promptly to correct.

Secondly, Your Honor, the Comptroller General and the pertinent chairmen of the two committees in the House and the Senate have already expressed themselves on the record, that the Department of Energy cannot achieve by rulemaking what they are seeking to do, and that is to change the statutory mandate. So there is an urgent need for the Court to act.

And, finally, Your Honor, this is a curious argument that the utilities raise. The utilities say we have bought all this foreign source uranium and led the domestic industry to its demise. And if the Court should enforce the statute we may be required to do something. And that, I speculate, may increase their costs, or may have some effect ultimately, Your Honor, on the DOE's enrichment enterprise. What the DOE is saying to the Court, "We are a high-cost operator, and we may lose some business because those utilities that have foreign source uranium may have that uranium enriched abroad." They will not impact adversely, the DOE enrichment enterprise that's impacted adversely, and that's what the heart of this mat-

ter, the industry is being sacrificed because this government enterprise has found itself to be a high-cost operator cannot compete with foreign enterprises.

So I respectfully and urgently request the Court, as [30] quickly as the Court feels it can, to grant our relief in full and impose an immediate ban. The Department will simply not change its view until and unless the Court requires that it do so. And these excuses, these rulemakings, these appeals, these complaints, are simply attempts to avoid what the Court, I'm sure, has seen to be the clear language of the statute. We have tried our best, Your Honor, to deal with this matter, through all avenues and we cannot—we stand before the Court today and say to the Court, "We need help immediately on this statute."

Thank your.

THE COURT: We will take a very short recess and then we will take Count Two.

MR. SHAVER: Thank your, Your Honor.

MR. NICKLES: Thank you, Your Honor.

[Whereupon at the hour of 2:19 o'clock p.m. the Court stood in recess and reconvened at the hour of 2:31 o'clock p.m.].

THE COURT: I would prefer to write an opinion on this matter, so that I could take time and meticulously set out the reasoning, but because the Justice Department has now delayed for almost two years the filling of two vacancies on this court, it's impossible for me to write opinions any more, and I haven't written any substantial opinions for many, many, many months. Therefore, I will simply state my rulings orally, and I'll order that plaintiff prepare and defendants approve as to form the [31] proposed order that will summarize the rulings to be submitted to the Court no later than 12:00 noon tomorrow.

As to the assertions in the motion directed to Count One, the defendants' motion for a stay of proceedings as to the Count One matter is denied.

As to the substance of the matter, the plaintiffs' summary judgment motion as to Count One is granted.

The defendants' cross motion for summary judgment as to Count One is denied.

Are there other pending motions as to Count One?

[No response].

THE COURT: Does that now take care of all of them?

I'm holding that the Department of Energy is subject to judicial review under the Administrative Procedure Act.

I'm further holding that a failure to act is an action by an agency, and I think that's clearly provided in 5 U.S. Code, Section 551 Sub 13. It's a closer issue when the Department of Energy's action or failure to act in this matter may be somehow within some form of discretion, but it appears to me that the Congressional mandate of 42 U.S. Code, Section 2201(v) is clear, and does not really leave any room for any discretion nor does the Atomic Energy, in my view, preclude judicial review here. The Block case, which has been cited, the Milk case, in my view, is clearly distinguishable and in that case the Act, itself, had created a class of litigants who did have the authority to proceed [32] and litigate in the matters. And, therefore, there wasn't any standing of the ultimate consumer of the milk to litigate. That's not saying that is the situation in this case. The general rule is that there is judicial review under the Administrative Procedure Act is nothing in this act to indicate that Congress intended any exception. When I talk to Block, I mean Block vs. Community Nutrition Institute in 104 Supreme Court, 2450, 1984 opinion by—I believe it was Justice O'Connor, Administrative Procedures Act infers a general caution upon persons affected or aggrieved by agency action, that's found in 5 U.S. Code

Section 702. And in the Block case, the Court simply held that consumer of milk products were precluded from seeking judicial review of milk market orders. But the Court there relied on language of the statute, itself, and its structure and its objectives, its complexity, and its legislative history. But the primary support for the conclusion came from the fact that the statute, itself, provided a complex administrative scheme for review of milk market orders and put the authority to pursue that review in the persons most likely to be aggrieved and for whose benefit the statute was passed, namely, the milk producers and not in the consumers.

There is no such action by Congress in this particular statute. Now, in this case, Congress, having stated that the suit may not be brought against individuals, except as authorized and brought by the Attorney General, it's the position of the plaintiffs here, and I think correctly, that this action is not [33] against individuals but against the agency in the way that an action against the agency can be brought. Here the only alternative would be a cite by the Attorney General or some other member of the executive branch, it seems to me that it's unlikely that there is going to be any relief provided anybody from that source. It leaves no way for any aggrieved party to bring a lawsuit.

In any event, I conclude that the Atomic Energy Act does not preclude judicial review of that agency's actions or that present Department of Energy's actions. It appears to me that even if there were some discretion given to the agency here to determine whether or what measures ought to be taken, clearly this statute does not leave the discretion not to take any measures at all to assure the provision of a viable domestic industry. It seems to me clear from the Congressional history that Congress intended that—that its language operate as a mandate, and if it didn't so intend then it ought to be swiftly amended so that

courts can understand that it didn't intend what its plain language says.

Let's go on to Count Three, I believe we are on. Which would—I guess I have already disposed of the Count Two issues.

MS. CLIFFORD: Your Honor, if I may, for purposes of clarification, does Your Honor—I'm asking if Your Honor would specify—

THE COURT: I'm inclined to grant the injunction but I [34] would like the parties to meet before the order, proposed order, is submitted. I'm trying to get through this fast enough so you can do that today. I don't like these things to sit around. I have got 500 cases of about this magnitude, I don't know how many you have got, but I have about 500 of them. And I can't keep them all in my head at once so I try to move them in and out as fast as I can and do the best job I can, and forget about them, and let the Court of Appeals worry about them after that.

I would urge the parties to meet and try to devise an injunction that would be workable to both. If I have to impose one I will simply do it in the best terms I can. But, generally speaking, parties know much more about their situation than a court can know in the little time we have available to review these complex matters. The parties also can settle their claims much better than they can usually be settled by decision by a court, and when you are unhappy with court decisions I hope you will take that into account. This matter could have been settled, still can be.

So by noon tomorrow I would like to receive a proposed order, including a proposed injunction, and if it's rational and reasonable I will probably sign it; if it's not, I won't.

Then let's move to Count Three, if you will, Counsel.

This is the plaintiffs'—plaintiff has a cross motion for summary judgment on Count Three, I believe, is that right?

MR. SHAVER: That's correct, Your Honor.

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**In the Supreme Court of the United States**

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No. 87-645

CLARK F. HUFFMAN, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC., ET AL.

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ORDER ALLOWING CERTIORARI. Filed January 11, 1988.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Tenth Circuit* is granted.

1987-25 1988

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

F. CLARK HUFFMAN, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC., ET AL.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

**BRIEF FOR THE PETITIONERS**

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#### QUESTION PRESENTED

Under Section 161(v) of the Atomic Energy Act of 1954 (42 U.S.C. 2201(v)), the Department of Energy (DOE) sells uranium enrichment services to electric utilities that use enriched uranium as reactor fuel. Section 2201(v) provides that DOE shall restrict its enrichment of foreign-source uranium intended for use in domestic facilities "to the extent necessary to assure the maintenance of a viable domestic uranium industry." The Department of Energy has determined that the domestic uranium industry is not viable and that the imposition of restrictions on the enrichment of foreign uranium would not make it viable.

The question is whether Section 2201(v) requires the Department of Energy to restrict the enrichment of foreign uranium whenever the domestic uranium industry is not viable, whether or not the imposition of such restrictions would make the domestic industry viable.



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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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No. 87-645

F. CLARK HUFFMAN, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC., ET AL.

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT*

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**BRIEF FOR THE PETITIONERS**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 825 F.2d 1430. The order of the district court (Pet. App. 22a-24a) is unreported.

**JURISDICTION**

The decision of the court of appeals was entered on July 20, 1987. The petition for a writ of certiorari was filed on October 18, 1987 and was granted on January 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATUTORY PROVISION INVOLVED**

Section 161(v) of the Atomic Energy Act of 1954, as it appears codified at 42 U.S.C. 2201(v), provides:

Contracts for production or enrichment of special nuclear material; domestic licensees; other nations;

(1)

prices; materials of foreign origin; criteria for availability of services under this subsection; Congressional review

[In the performance of its function the Commission is authorized to]

(A) enter into contracts with persons licensed under sections 2073, 2093, 2133 or 2134 of this title for such periods of time as the Commission may deem necessary or desirable to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission; and

(B) enter into contracts to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission in accordance with and within the period of an agreement for cooperation arranged pursuant to Section 2153 of this title while comparable services are made available pursuant to paragraph (A) of this subsection:

*Provided*, That (i) prices for services under paragraph (A) of this subsection shall be established on a non-discriminatory basis; (ii) prices for services under paragraph (B) of this subsection shall be no less than prices under paragraph (A) of this subsection; and (iii) any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time: *And provided further*, That the Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The Commission

shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States: *Provided*, That before the Commission establishes such criteria, the proposed criteria shall be submitted to the Joint Committee, and a period of forty-five days shall elapse while Congress is in session (in computing the forty-five days there shall be excluded the days in which either House is not in session because of adjournment for more than three days) unless the Joint Committee by resolution in writing waives the conditions of, or all or any portion of, such forty-five-day period.

#### STATEMENT

This case concerns the meaning of Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. 2201(v), which requires the Department of Energy (DOE) to restrict its enrichment of foreign-source uranium intended for use in domestic facilities "to the extent necessary to assure the maintenance of a viable domestic uranium industry."<sup>1</sup> The Secretary of Energy has found that the domestic uranium mining and milling industry is not viable, and that restrictions on the enrichment of foreign uranium—including

<sup>1</sup> The primary civilian use of uranium is as a fuel for nuclear reactors that produce commercial electric power. Because natural uranium does not contain enough of the fissionable isotope U-235 to serve as a reactor fuel, it must undergo a process known as enrichment. The enrichment process for commercial reactor fuel increases natural uranium's U-235 content from approximately one percent to approximately three percent. See Pet. App. 4a.

even a total prohibition on such enrichment—would not make the domestic industry viable. Because the Secretary interprets Section 2201(v) to authorize restrictions on enrichment of foreign uranium only when this would serve the statutory goal of assuring a viable domestic industry, he has not imposed such restrictions. The lower courts disagreed with this construction of the statute, holding that once the Secretary determines that the domestic industry is not viable, he must automatically terminate the provision of enrichment services for foreign uranium, and may not consider whether such termination would have any effect on the viability of the domestic industry.

#### A. Federal Regulation of Nuclear Materials

Pervasive federal regulation of atomic energy, and in particular of nuclear materials, began with the Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (1946 Act). The 1946 Act created the Atomic Energy Commission (AEC) and established a government monopoly over all aspects of nuclear power and materials. Private persons were forbidden to own nuclear power plants, nuclear enrichment facilities, or nuclear reactor fuel—"special nuclear material."<sup>2</sup> Instead, the 1946 Act provided that "[a]ll right, title and interest \* \* \* in or to any fissionable material \* \* \* shall be the property of the [Atomic Energy] Commission \* \* \*" (§ 5(a)(2), 60 Stat. 760).

Congress thoroughly overhauled the 1946 Act in the Atomic Energy Act of 1954, 42 U.S.C. (& Supp. III) 2011 *et seq.* (1954 Act), which remains the principal statute governing atomic energy. The 1954 Act ended the govern-

<sup>2</sup> "Special nuclear material" is defined in 42 U.S.C. 2014(aa) and includes plutonium and enriched uranium. The term "source material" refers to unenriched uranium or thorium (42 U.S.C. 2014(z)).

ment's monopoly on the generation of atomic power, authorizing the AEC to license private persons to own and operate nuclear reactors (§§ 102-104, 42 U.S.C. 2132-2134).<sup>3</sup> It did not, however, end the government's monopoly on the ownership of nuclear fuel; all special nuclear material continued to be property of the AEC, and was leased to private nuclear power generators (§ 158, 42 U.S.C. 2188). The 1954 Act thus created an expanded domestic market for enriched uranium—and, derivatively, for the raw uranium produced by the domestic uranium mining and milling industry—but the 1954 Act retained the role of the AEC as the sole buyer from the uranium industry and the sole source of leased fuel for the nuclear power industry. See Pet. App. 3a.

In 1964, Congress enacted the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602 (the Private Ownership Act), and again substantially revised the federal role with respect to nuclear fuel. The Private Ownership Act eliminated the government's monopoly on the ownership of special nuclear material and permitted private persons—principally, electric utilities operating nuclear reactors—to own enriched uranium. But although the government's legal monopoly on the ownership of nuclear fuel ended, its *de facto* monopoly as a provider of commercial-scale enrichment services continued. See S. Rep. 1325, 88th Cong., 2d Sess. 2 (1964) [hereinafter *Private Ownership Act Report*]; Pet. App. 4a. Recognizing this fact, Congress authorized the

<sup>3</sup> Besides restricting ownership of "utilization facilities" such as nuclear reactors, the 1946 Act prohibited private ownership of "production facilities," including enrichment plants (§ 4, 60 Stat. 759). The provisions of the 1954 Act which permit private ownership of utilization facilities also apply to licensed production facilities. There are, however, currently no privately-owned enrichment facilities in the United States.



AEC to offer "toll enrichment" services, whereby utilities could obtain unenriched uranium on the open market and have it enriched by the AEC for a fee.

One purpose of permitting private ownership of special nuclear materials was to put the relatively young domestic uranium industry on a sounder economic footing. By allowing the uranium industry and nuclear fuel users to function in a more normal market relationship, the Private Ownership Act hoped to encourage "the domestic uranium mining and milling industry to develop normally without future reliance on the U.S. Government for its market" (*Private Ownership Act Report* 10). Nevertheless, Congress was concerned about what might happen to the uranium industry in the transition period from a controlled to a more open market, and in particular about the possible effects of competition from foreign sources of uranium. After hearing in considerable detail from the Atomic Energy Commission as well as uranium producers and consumers (see *Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 1st Sess. (1963) [hereinafter 1963 *Private Ownership Hearings*]; *Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 2d Sess. (1964) [hereinafter 1964 *Private Ownership Hearings*]), the Joint Committee on Atomic Energy decided that AEC enrichment of foreign uranium for use in domestic facilities — which at the time was the only way foreign sources could effectively compete with domestic producers — was a question "of sufficient importance to be treated specifically in the legislation" (*Private Ownership Act Report* 30). Congress accordingly included in the authorization of toll enrichment the proviso that the AEC must restrict enrichment of foreign-source uranium for

domestic use "to the extent necessary to assure the maintenance of a viable domestic uranium industry" (§ 161(v), 42 U.S.C. 2201(v)).

Section 2201(v) also directed the AEC to "establish criteria in writing" which would include a provision governing "the extent to which such [enrichment] services will be made available for source or special nuclear material of foreign origin intended for use [domestically] \* \* \*." The initial criteria established by the Commission (see 31 Fed. Reg. 16479 (1966)) provided that the AEC would enrich no foreign-source uranium for domestic use. In 1974, after soliciting comments (38 Fed. Reg. 32595 (1973)), the AEC amended its enrichment services criteria by establishing a schedule by which all restrictions on enrichment of foreign uranium for use in domestic facilities would be eliminated by 1984 (39 Fed. Reg. 38016 (1974)).<sup>4</sup> The scheduled phase-out of restrictions took place as planned, and DOE has not since reimposed any restrictions on enrichment of foreign uranium.<sup>5</sup>

## B. The Collapse of the Domestic Uranium Industry

1. In the late 1970's and early 1980's, the economic condition of the domestic uranium industry deteriorated rapidly and dramatically (Pet. App. 5a). The main cause of this development was "a classic oversupply situation"

<sup>4</sup> The criteria permitting the enrichment of foreign uranium were reported to Congress pursuant to Section 2201(v)'s 45-day report-and-wait provision; Congress took no adverse action.

<sup>5</sup> The AEC was abolished in 1974 by the Energy Reorganization Act of 1974, Pub. L. No. 93-438, § 104(a), 88 Stat. 1237. Its "licensing and related regulatory functions" were transferred to the Nuclear Regulatory Commission (NRC) (§ 201(f), 88 Stat. 1243). All other AEC functions, including the enrichment services program, were transferred to the Energy Research and Development Administration, a predecessor of the Department of Energy (DOE) (§ 104(c), 88 Stat. 1237).

(*Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports: Hearing Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 15 (1981) (statement of Shelby Brewer, Assistant Secretary of Energy for Nuclear Energy) [hereinafter *1981 Hearing*]). On the one hand, domestic exploration and other investment in the uranium industry had increased significantly in the 1970's, in response to optimistic projections of future demand (*id.* at 19-20 (charts 2, 3, 4, showing peak and decline of exploration, employment, and capital expenditures)). But just as supply was increasing, developments threatening the economic feasibility of nuclear power generation, and heightened concerns over reactor safety triggered by the Three Mile Island incident, led to a wave of "reactor delays and cancellations, and [a] lack of new reactor orders" (*id.* at 12).

The result was a precipitous decline in the price of uranium ore. As one report put it, the industry suffered "a collapse that by industrial standards occurred practically overnight" (Blundell, *U.S. Uranium Mines, Thriving 5 Years Ago, Are Nearing Extinction*, Wall St. J., June 12, 1985, at 1). In 1981, the Edison Electric Institute, a utility trade association, reported that the spot market price of uranium had plunged from \$43.25 per pound in 1979 to \$23.50 per pound (*1981 Hearing* 148 (statement of Edison Electric Institute)). By 1984, the spot market price had fallen to \$15.50 per pound, which the industry informed DOE was less than one-half the conventional United States producers' average cost of production (51 Fed. Reg. 27132, 27136 n.12 (1986)). The spot market price has not recovered appreciably since then.<sup>6</sup>

<sup>6</sup> The spot market price was \$16.30 per pound on February 17, 1988 (see *Financial Times*, Feb. 17, 1988, at 30).

Other developments also contributed to the decline of the domestic uranium industry during this period. Beginning in the mid-1970's, DOE lost its monopoly as the only provider of enrichment services for commercial nuclear reactors. Two European consortia and the Soviet Union began to supply foreign nuclear facilities with enriched uranium, produced largely from foreign-source ore (51 Fed. Reg. 3624, 3625, 3627 (1986)). By 1986, because of their lower prices, these competitors of DOE had "captured about 60 percent of the total foreign market and \* \* \* made significant inroads into the domestic markets" (*id.* at 3625). Domestic utilities therefore had an incentive to obtain enriched uranium (derived from foreign ore) abroad, bypassing DOE and the domestic uranium industry entirely. Moreover, as part of the same imbalance of supply and demand that affected the domestic uranium mining and milling industry, many utilities found themselves committed to long-term contracts to purchase enrichment services that they no longer needed; this "led to the emergence of a secondary market in which utilities have been willing to sell their surplus SWU's [separative work units] to other utilities at discounts of \$30 per SWU and more" (*id.* at 3625).<sup>7</sup> The emergence of this secondary market in enriched uranium created another competitive alternative to the purchase of domestic uranium ore.

<sup>7</sup> A SWU is a measure of the production capacity of uranium enrichment plants and hence a unit in which enrichment services can be measured (51 Fed. Reg. 3625 & n. 1 (1986)). SWU's "measure the amount of effort expended to separate a given amount of natural uranium into two components—one having a higher concentration of fissionable Uranium-235" (*id.* at 3625 n.1). Trade in the secondary market generally takes place in enriched uranium, with quantities measured in SWU's.



2. a. DOE sought to deal with this crisis in the domestic uranium industry in several ways. In an effort to stimulate demand, the Department continued to promote the expanded use of commercial nuclear energy (see *1981 Hearing* 12-13). And in an attempt to minimize the market's perception of oversupply, DOE stated that it would not draw down or sell off the considerable stockpile of uranium under its control (*e.g.*, *id.* at 13). But the Department had no statutory authority to regulate either the importation of enriched uranium, or the secondary market in enriched uranium. Both of these sources, which offer direct competitive substitutes for the product of the domestic uranium industry, were and are subject to the exclusive oversight of the Nuclear Regulatory Commission (NRC).<sup>8</sup>

b. In 1982, Congress turned its attention to the plight of the domestic uranium industry. Although the Senate approved a bill that would have imposed significant restrictions on uranium imports (see 128 Cong. Rec. 5751 (1982)) and a Conference Committee recommended a less drastic but still potentially restrictive measure (see *id.* at Cong. Rec. 26799-26801), the House rejected even the Conference Committee proposal (see *id.* at 28543-28544). Instead, Congress responded to the industry's difficulties

<sup>8</sup> The AEC's authority to license the domestic sale or the importation of special nuclear material (see 42 U.S.C. 2073(a)) is now vested in the NRC. While a license from the NRC is needed to import or transfer enriched uranium (42 U.S.C. 2073(a); see also 42 U.S.C. 2201(b)), no provision of the Atomic Energy Act requires the NRC to exercise its authority to protect the domestic industry or suggests that this authority is directed to economic regulation rather than regulation to prevent radiological hazards or in the interests of national defense and security. Our suggestion in the petition (at 8 n.5) that the NRC's licensing authority with respect to special nuclear material is governed by 42 U.S.C. 2099 was in error; Section 2099 applies to source material, not special nuclear material.

by adding Section 170B to the Atomic Energy Act of 1954, 42 U.S.C. 2210b. This statute sets forth a series of reporting requirements to ensure that Congress can monitor the condition of the domestic uranium industry; requires the Secretary of Energy to promulgate criteria for assessing the viability of the domestic uranium industry, and sets forth eight statutory criteria that the Secretary is to consider in making such a determination;<sup>9</sup> and directs the Secretary to submit annual reports on the viability of the domestic uranium industry to both the President and the Congress.

<sup>9</sup> The statute (42 U.S.C. 2210b(c)) provides:

Criteria for monitoring and reporting requirements

The criteria referred to in subsection (a) of this section shall also include, but not be limited to—

(1) an assessment of whether executed contracts or options of source material or special nuclear material will result in greater than 37-1/2 percent of actual or projected domestic uranium requirements for any two-consecutive-year period being supplied by source material or special nuclear material from foreign sources;

(2) projections of uranium requirements and inventories of domestic utilities for a 10 year period;

(3) present and probable future use of the domestic market by foreign imports;

(4) whether domestic economic reserves can supply all future needs for a future 10 year period;

(5) present and projected domestic uranium exploration expenditures and plans;

(6) present and projected employment and capital investment in the uranium industry;

(7) the level of domestic uranium production capacity sufficient to meet projected domestic nuclear power needs for a 10 year period; and

(8) a projection of domestic uranium production and uranium price levels which will be in effect under various assumptions with respect to imports.



Pursuant to Section 2210b, the Secretary issued criteria for determining the viability of the domestic uranium industry (10 C.F.R. Pt. 761). Elaborating on the factors specified by Congress, the criteria define "viability" primarily in terms of "the extent to which the domestic mining and milling uranium industry will be capable, at any particular time, of supplying the needs of the domestic nuclear power industry under a variety of hypothetical conditions" (48 Fed. Reg. 45747 (1983)). Although the financial condition of the domestic uranium industry is one factor to be examined, the criteria make clear that the focus is on whether the industry can supply all of the nation's military and nuclear power needs at an acceptable cost in the event of various future contingencies, such as an interruption of imports. See Energy Info. Admin., Dep't of Energy, *Domestic Uranium Mining and Milling Industry: 1985 Viability Assessment* x, 55-62 (1986) (evaluation of likely effects of supply interruptions) [hereinafter *1985 Viability Assessment*].

In December 1984, the Secretary made his first viability finding pursuant to Section 2210b and the criteria. He concluded that the domestic industry had been viable in 1983. In September 1985, however, the Secretary determined that in 1984 the industry was not viable. See *1985 Viability Assessment* ix. In December 1986, and December 1987, the Secretary found that the domestic industry was not viable in 1985 and 1986, respectively.<sup>10</sup>

<sup>10</sup> The Secretary's annual determination of viability is made in a memorandum from the Secretary to the President (see, e.g., J.A. 49-50); the Secretary also informs the President of the Senate and the Speaker of the House of his determination. The Secretary bases his determination on the viability assessment prepared by DOE's Energy Information Administration (see, e.g., *1985 Viability Assessment*).

### C. The Secretary's Rulemaking

Four months after the initial determination that the domestic uranium industry was not viable, the Secretary initiated a rulemaking to revise the criteria under which enrichment services are offered. See 10 C.F.R. Pt. 762. The notice of proposed rulemaking specifically addressed the question whether the depressed condition of the domestic industry required the Secretary to impose restrictions on the enrichment of foreign-source uranium under Section 2201(v) (51 Fed. Reg. 3624 (1986) (initiation of rulemaking)). The notice indicated that the Secretary proposed not to restrict the enrichment of foreign uranium, because he believed that "[i]mport restrictions on foreign uranium would not assure the viability of the domestic mining and milling industry" (*id.* at 3627).

After extensive comment, the Secretary adopted final revised criteria that again did not contemplate any restriction on enrichment of foreign uranium (51 Fed. Reg. 27132 (1986)). The explanation of that decision addressed both the Secretary's understanding of the meaning of Section 2201(v), which had been challenged by comments from the domestic uranium industry, and the question whether restrictions on the enrichment of foreign uranium would in fact assure the viability of the domestic uranium industry. The Secretary adhered to the legal view that "[t]he plain language of the statute makes clear that restrictions are not to be imposed automatically if the domestic industry is non-viable but only if they are needed to, and in fact, will assure the maintenance of a viable domestic uranium industry" (51 Fed. Reg. 27134 (1986)).

On the factual question, the Secretary concluded that "restrictions would not assure the viability of the domestic mining and milling industry" (51 Fed. Reg. 27135 (1986)). The Secretary found that the domestic industry's diffi-

culties arose from "structural weaknesses," chiefly the collapse in demand that had led to a situation in which "the market simply will not sustain a price for [uranium] that enables the industry to recover its costs of production" (*ibid.*).<sup>11</sup> Restrictions on enrichment would do nothing to address those basic difficulties (*ibid.*). Moreover, the Secretary determined that restrictions on enrichment would not protect domestic producers from foreign competition because of DOE's lack of market power in the market for enrichment services: "[w]hile DOE is the only provider of uranium enrichment services in the United States, DOE nonetheless lacks 'market power' because enrichment services are available, at comparable or lower costs, from foreign sources" (*ibid.*). Due to the availability of these competitive alternatives to DOE's enrichment services, "DOE cannot force enrichment customers to use domestic uranium when it is not in their economic self-interest to do so" (*id.* at 27138).

Having found that imposition of restrictions on enrichment would not assure the viability of the domestic uranium industry, the Secretary went on to examine the likely effects of such restrictions. He concluded that "restricting DOE's ability to enrich foreign uranium is likely to be counterproductive and to further damage the U.S. mining industry" (51 Fed. Reg. 27136 (1986)). This was because restrictions on enrichment of foreign uranium would cause some of DOE's current customers to look elsewhere for enrichment services. This in turn would increase DOE's unit costs of production, which would have to be passed on to its remaining customers (see 42 U.S.C. 2201(v)(B)(iii)). The higher charges for DOE's enrichment

<sup>11</sup> "[H]igher grade ore and lower production costs make it possible to buy foreign uranium for less than what it costs to produce domestic uranium." 51 Fed. Reg. 27135 (1986).

services would put the domestic uranium industry (which supplies feed for DOE enrichment almost exclusively) at even greater competitive disadvantage in what had become a world market for enriched uranium (see 51 Fed. Reg. 27135-27136 (1986)). Accordingly, the Secretary adopted final enrichment criteria that do not restrict enrichment of foreign uranium.<sup>12</sup>

#### D. This Litigation

Respondents, three domestic uranium mining and milling companies, brought this lawsuit in the United States District Court for the District of Colorado on December 7, 1984. The complaint challenged a number of DOE policies and alleged practices (see J.A. 8-10). The only allegation relevant here is set forth in Count I,<sup>13</sup> which claimed that DOE's failure to impose restrictions on the enrichment of foreign uranium for use in domestic facilities is unlawful. In their summary judgment motion, respondents main-

<sup>12</sup> In the continuing resolution that funded DOE for the fiscal year ending September 30, 1987 (Act of Oct. 18, 1986, Pub. L. No. 99-500, § 305, 100 Stat. 1783-209), Congress provided that "no provision of this joint resolution or the July 24, 1986, criteria shall effect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities \* \* \*." We do not rely on any provision of the joint resolution as having ratified the Secretary's interpretation of Section 2201(v) as expressed in the preamble to the criteria. We have referred to the explanation accompanying the 1986 rulemaking because it is the most extensive and authoritative expression of the Secretary's assessment of the likely effects of enrichment restrictions on the domestic uranium industry.

<sup>13</sup> The court of appeals mistakenly refers to this issue as Count IV (Pet. App. 14a).



tained that the only material facts were that the domestic industry is not viable and that DOE had not imposed restrictions on enrichment of foreign uranium. On those facts, respondents claimed that they were entitled to judgment as a matter of law. J.A. 27-28; 36. Initially, respondents asked the district court to order DOE to undertake a rulemaking to determine the appropriate level of restrictions. Later, however, they asked the district court to issue an order imposing its own restriction levels. Petitioners submitted a cross-motion for summary judgment in which they agreed that the domestic uranium industry was not currently viable, within the meaning of Section 2210b and the Secretary's criteria (J.A. at 49-50). But petitioners maintained that this did not mean that restrictions had to be imposed on enrichment of foreign uranium, because in the Secretary's view such restrictions would not assure a viable domestic uranium industry (*id.* at 46-47, 61-62; 66).<sup>14</sup>

On June 5, 1986, the district court at a hearing granted respondents' motion for summary judgment as to Count I. At the hearing, the court expressed the view that Section 2201(v) requires the imposition of restrictions on enrichment of foreign uranium whenever the domestic industry is not viable, regardless of whether such restrictions would restore viability: "To me [the statute] says that the agency \* \* \* shall not offer [enrichment] services for source or special nuclear materials of foreign origin—period" (J.A. 66, Pet. App. 25a). The district court entered an order re-

<sup>14</sup> The Secretary commenced the 1986 rulemaking (see pp. 13-15, *supra*) while the suit was proceeding in the district court. The final rule was adopted after the district court issued its order, while the order was stayed by the court of appeals. 51 Fed. Reg. 27134 n.4 (1986). This litigation does not involve a direct challenge to the revised criteria adopted in the rulemaking.

quiring DOE to limit its enrichment of foreign uranium to 25% of all material enriched between June 6, 1986 and December 31, 1986, and imposing a total ban on enrichment of foreign uranium beginning January 1, 1987 (Pet. App. 23a). The court further ordered DOE to commence a rulemaking to establish criteria for providing enrichment services that would "assure the maintenance of a viable domestic uranium industry" (*ibid.*).<sup>15</sup>

Petitioners appealed to the United States Court of Appeals for the Tenth Circuit,<sup>16</sup> which affirmed the district court's grant of summary judgment on this issue (Pet. App. 1a-21a).<sup>17</sup> The court of appeals began its analysis by

<sup>15</sup> The court stated that "[i]f the Department believes that criteria less restrictive than those imposed by this order would assure the maintenance of a viable domestic uranium industry, then the Department shall clearly articulate its reasons for such a position" (Pet. App. 23a). Although this order recognizes that the Secretary has discretion to set the level of restrictions when such restrictions would, in the Secretary's view, maintain the viability of the domestic industry, it does not permit the Secretary to do what he believes is contemplated by the statutory language—impose no restrictions when it is impossible, by limiting enrichment services, to assure the viability of the domestic uranium industry, and when in his view, imposition of restrictions would further damage the domestic uranium industry.

<sup>16</sup> The court of appeals entered an order staying the district court's injunction on July 21, 1986. In addition, while this case was pending in the court of appeals Congress adopted a continuing resolution funding DOE and other agencies for the fiscal year that ended on September 30, 1987 which contained a provision expressly authorizing DOE to continue to enrich foreign uranium until this lawsuit comes to "final judgment." § 305, 100 Stat. 1783-209.

<sup>17</sup> The court of appeals also reviewed the district court's decision on another count of the complaint attacking aspects of DOE's standard form enrichment services contract not directly concerned with enrichment of foreign uranium. The court of appeals remanded that issue for further fact-finding to determine whether respondents had standing to maintain their claim. See Pet. App. 6a-14a. This part of the court of appeals' judgment is not challenged here.



noting that the parties agreed that the domestic uranium industry is not now viable (*id.* at 14a). Consequently, the court did not address the meaning of "viability." Stating that the issue under Section 2201(v) involved a question of statutory construction, the court rejected the Secretary's view that the phrase "to the extent necessary to assure the maintenance of a viable domestic uranium industry" means that restrictions need not be imposed when they will not assure the maintenance of a viable domestic industry. Instead, the court found that the statute "instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed and must become increasingly aggressive, to the point of 100% restriction, until the domestic industry is rejuvenated and becomes viable" (Pet. App. 17a). According to the court, Section 2201(v) "does not provide that increasingly stiffer restrictions are required only to the point that DOE determines that such restrictions will not resuscitate the industry" (Pet. App. 17a-18a). At petitioners' request, the Tenth Circuit has issued a stay of its mandate that will continue until this petition is disposed of.

#### SUMMARY OF ARGUMENT

Section 2201(v) directs the Department of Energy to restrict the enrichment of foreign-source uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry." This means that DOE must determine what level of restrictions will assure viability, and impose it. However, if no level of restrictions will assure viability, the statute does not require DOE to engage in a futile exercise. Section 2201(v) authorizes restrictions on enrichment of foreign uranium for one purpose and one purpose only: to assure a viable domestic

uranium industry. It does not authorize restrictions for any other purpose, even if this might confer a transient economic benefit upon domestic producers.

The district court and the court of appeals read the statute differently. In their view, Section 2201(v) requires the Secretary to impose restrictions on enrichment of foreign uranium whenever the domestic uranium industry is found not to be viable, whether or not such restrictions would have any effect on the viability of the domestic industry. This reading does violence to the statutory language by ignoring the fact that the purpose of restrictions, and of the statute, is to maintain a viable domestic uranium industry. According to the court of appeals, Section 2201(v) mindlessly directs the Secretary to take measures that will not accomplish their explicit purpose.

Respondents in this Court have suggested a third possible reading of the statute. Respondents now suggest that Section 2201(v) may mean that DOE must impose restrictions on enrichment of foreign uranium whenever the agency determines that this is a "necessary condition" of a viable domestic industry, even if such restrictions are not a "sufficient condition" of viability. But the statute does not speak of necessary as opposed to sufficient conditions. It says that restrictions are to be imposed to the extent necessary *to assure* a viable domestic industry. A restriction which is "necessary to assure" viability is, to use respondents' terms, one that is a *sufficient* condition of viability. Furthermore, respondents' reading would require the Secretary to engage in an unbounded exercise in speculative predictions about what might happen if restrictions are imposed in conjunction with various other hypothetical changes in the market or the regulatory climate. There is no support for the notion that Congress had any such exercise in mind when it enacted Section 2201(v).

The history of congressional action on this subject reinforces DOE's interpretation and offers no support for the contrary views. When it enacted the Private Ownership Act in 1964, Congress foresaw a future of continuous growth for the nuclear power industry, in which the relatively young domestic uranium industry would eventually face such a large market for its product that it could compete with foreign suppliers without any threat to its basic survival. The primary purpose of Section 2201(v) was to allow the AEC to phase in competition from foreign sources, so as to assure minimal disruption in the growth of the domestic industry.

What Congress clearly did not foresee is the present state of affairs, where demand for domestic uranium has collapsed and alternative sources of enriched uranium have emerged that render DOE powerless to restore the domestic industry to viability by cutting off enrichment of foreign uranium. Nevertheless, Congress was acutely aware "that many unforeseeable developments may arise in this field \* \* \*." *Private Ownership Act Report* 19 (quoting 60 Stat. 755). Accordingly, it rejected any rigid approach to dealing with competition from foreign uranium, and opted instead for a flexible regulatory standard that would require the Secretary to determine whether restrictions would have any effect on the viability of the domestic industry. The mechanical interpretation of Section 2201(v) adopted by the court of appeals cannot be squared with this approach.

Furthermore, the Joint Committee on Atomic Energy specifically noted that because of future uncertainties, the state of the domestic uranium industry was "a matter which the committee will follow closely with a view to determining whether further legislation is required" (*Private Ownership Act Report* 16). In 1982, faced with

the precipitous decline of the domestic uranium industry, Congress made good on this commitment, and revisited the question of the impact of imported uranium on the viability of the domestic uranium industry. In so doing, Congress specifically rejected a bill that would have imposed mandatory restrictions on the enrichment of foreign uranium. Instead, it directed the Secretary to issue an annual viability determination and report. See 42 U.S.C. 2210b. In effect, the congressional response to the decline of the domestic uranium industry was to reject relief very similar to that imposed by the district court in this case, casting further doubt on the lower courts' interpretation of Section 2201(v).

There are suggestions in the opinion below that the court of appeals' decision may rest, at least in part, on disagreements with DOE on questions that were not presented by respondents' motion for summary judgment. Some of the court of appeals' statements imply that it simply disbelieved DOE's determination—never challenged in this litigation, let alone tested and refuted—that restrictions on enrichment of foreign uranium would not assure the viability of the domestic industry. Such extra-record fact-finding would of course be improper. It is also possible that the court of appeals may have implicitly relied on a definition of viability that is at odds with DOE's understanding. The agency's criteria for making a viability assessment, based on Section 2210b of the statute, focus on whether the domestic industry is capable of meeting all of the nation's military and energy needs at an acceptable cost. The court of appeals, in contrast, may have assumed that viability refers solely to whether the domestic uranium industry is profitable. Although a total prohibition on enrichment of foreign uranium might possibly have some impact on the short run profitability of the domestic uranium industry, it does not follow that



such a prohibition would give rise to an industry that can fulfill the nation's long-run energy and military needs. To the extent the court of appeals' decision may have rested in these implicit disagreements with the Secretary's determinations, it was in error.

#### ARGUMENT

#### THE COURT OF APPEALS ERRED IN HOLDING THAT SECTION 2201 (V) REQUIRES DOE TO RESTRICT ENRICHMENT OF FOREIGN URANIUM WHENEVER THE DOMESTIC URANIUM INDUSTRY IS NOT VIABLE, WITHOUT REGARD TO THE EFFECT RESTRICTIONS MIGHT HAVE ON VIABILITY

##### A. DOE's Reading of the Statutory Language is Correct 1. DOE's Interpretation

Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. 2201(v), directs DOE to restrict its enrichment of foreign uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry." The question in this case is whether it matters, in determining DOE's obligations under the statute, if restrictions in fact *would* assure the maintenance of a viable domestic industry—or indeed, given the court of appeals' complete disregard for consequences, if they even *might* produce viability. DOE maintains that its obligations under the statute depend upon the effects of restrictions on the viability of the domestic uranium industry, and that when it finds that restrictions would not assure viability there is no obligation—and hence no authority—to impose them.

This is the most plausible reading of the statutory language. As the Court has observed, "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Ass'n*, 310 U.S. 534, 543 (1940). Here,

the statute states its purpose on its face—maintenance of a viable uranium industry—and instructs DOE to employ a specified means—enrichment restrictions—"to the extent necessary to assure" that this purpose is accomplished.<sup>18</sup> The Secretary of Energy, in implementing Section 2201(v), therefore must look first to conditions prevailing in the domestic uranium industry and then to the effects of enrichment restrictions on those conditions. If the domestic industry is viable but enrichment of foreign uranium threatens its viability, then restrictions are to be imposed to the extent necessary to eliminate the threat. Similarly, if the domestic industry is not viable but some level of restrictions would make it viable, then that level of restrictions must be imposed. On the other hand, if the domestic industry is viable and the imposition of restrictions is not needed to keep it viable, then the statute does *not* require, or even authorize, the Secretary to restrict enrichment. For the same reason, if the industry is not viable, and no level of restrictions on enrichment would make it viable, then the statute again neither directs nor authorizes the Secretary to impose restrictions. In short, the statute tells the Secretary when and how to employ a particular causal mechanism to achieve a specified end; when the mechanism cannot achieve the end, the statute requires no action.

This is the intuitive, natural reading of the language; it rests on a purpose that is plain on the face of the provision. Moreover, this Court has held that if there are several reasonable interpretations of the text, the agency may follow its own reading as long as that is a permissible construction. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (agency view will be upheld if it is "a permissible construction" of

<sup>18</sup> A means-end relationship is traditionally expressed through the word "necessary." See U.S. Const., Art. I § 8, Cl. 18; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).



the agency's statutory mandate). Here, DOE's reading is the most plausible; it is therefore "sufficiently rational to preclude a court from substituting its judgment for that of [the agency]." *Young v. Community Nutrition Inst.*, 476 U.S. 974, 981 (1986).

In this respect, the case is controlled by *Young v. Community Nutrition Institute*, *supra*. There, the FDA's decision not to promulgate regulations limiting the quantity of a certain carcinogen present in foods was challenged. The FDA's statutory mandate, drawn in words that parallel the language of Section 2201(v), stated that the Administrator "shall promulgate regulations limiting the quantity [of such substance] to such extent as he finds necessary for the protection of public health." Like the lower courts here, the respondents in *Young* "view[ed] the word 'shall' as unqualified," and argued that the phrase "to such extent as he finds necessary" gave the agency "discretion in setting the particular level, but not in deciding whether to set a tolerance level at all" (476 U.S. at 980). Rejecting that argument, this court deferred to the FDA's interpretation of the statute, which was "that the phrase 'to such extent as he finds necessary for the protection of public health' \* \* \* modifies the word 'shall' " (*ibid.*). The agency construction, the Court held, was "sufficiently rational to preclude a court from substituting its judgment for that of the FDA" (*id.* at 981).

The decision below cannot be squared with the Court's holding in *Young*. In *Young*, the Court found that "the phrasing" of the statute at issue was "ambiguous" because the decisive "appositive phrase"—"to such extent as he finds necessary"—was "free-floating" (476 U.S. at 981). In Section 2201(v), however, the phrase "to the extent necessary to assure the maintenance of a viable domestic uranium industry" appears as a prefix to the word "shall," and is clearly the condition precedent of the statutory obligation. Moreover, in *Young* either of two competing

constructions could have been adopted without "endors[ing] an absurd result" whereas, here, the operation of Section 2201(v) would only be "sensible" if DOE's interpretation is upheld. 476 U.S. at 981. Accordingly, this Court's disposition of the much closer question in *Young* necessarily requires deference to DOE's construction of Section 2201(v).

## 2. The court of appeals' view

The court of appeals' reading, by contrast, is ill-considered. According to the court of appeals, DOE must impose enrichment restrictions whenever the domestic industry is not viable, without regard to the effect of restrictions on viability. As that court put it, Section 2201(v) "does not provide a scenario in which the DOE is excused from restricting foreign enrichment notwithstanding a nonviable domestic industry" (Pet. App. 17a). This approach treats non-viability as a triggering event, and ignores the fact that viability is the provision's—and the restrictions'—purpose. According to the court of appeals, Section 2201(v), which states its purpose on its face, commands DOE to engage in pointless action.

The court of appeals appears to have been led astray by the fact that the statute is obviously mandatory in one sense, and by the mistaken impression that DOE was claiming unfettered discretion to decide whether or not to impose restrictions. The court of appeals correctly noted that "'shall' is usually mandatory language" (Pet. App. 17a), and correctly reasoned that Section 2201(v) imposes a non-discretionary duty on the agency. See *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-775 (1984). But starting from those sound premises, it was error to conclude that, because the agency has a mandatory duty to take certain measures

when they will achieve a stated goal, it has a similar duty to take those measures whether or not they will achieve the goal. Moreover, DOE has never maintained that it has the discretion to "abandon the statutory goal" (Pet. App. 18a). DOE's position has always been that it must exercise its judgment and expertise in deciding whether restrictions would meet that goal and, if they would not, that it is not compelled to impose pointless restrictions. DOE's position rests, not on a claim of inherent agency discretion, but on the language of Section 2201(v).

An examination of the possible consequences of the court of appeals' construction confirms its error. If the court of appeals is correct, then the statute forbids any inquiry into the reason the domestic industry is not viable, even if that reason is something that restrictions cannot possibly redress. Thus, if domestic uranium has become prohibitively expensive or (in the extreme case) if domestic reserves have been completely exhausted, the court of appeals' reading would nevertheless force DOE to impose a total restriction on enrichment of foreign uranium—even though the only consequence of such a restriction would be to put DOE out of the enrichment business.<sup>19</sup> Contradictions of this sort arise inevitably when an explicitly goal-directed statute is interpreted without regard to the goal.

<sup>19</sup> Respondents have characterized our use of the total exhaustion hypothetical as "fanciful" (Br. in Opp. 13 n.17). But it is not necessary to posit total exhaustion to make the point: any severe impairment of the domestic industry caused by factors other than imports—such as prohibitively high prices or an industry-wide strike—would present the same dilemma. The hypothetical is embarrassing to the court of appeals' position, precisely because it underlines Section 2201(v)'s structure: the provision has a purpose and relies on a particular causal mechanism in order to achieve that purpose. The court of appeals reasoned as if restrictions were an end in themselves.

### 3. Respondents' suggestion

In this Court, respondents have suggested for the first time (Br. in Opp. 13-14) that Section 2201(v) uses the word "necessary" in the technical, logical sense in which it contrasts with "sufficient." Read in this fashion, the statute requires that restrictions be imposed if they are a necessary condition of viability—that is, if viability cannot be achieved in the absence of restrictions. But, on this reading, the statute does not require that the restrictions be a sufficient condition of viability; other developments in the uranium market, or other policy initiatives, may also be required before the domestic industry is actually restored to viability.

Respondents' suggested interpretation, however, is no more consistent with the statute than that of the court of appeals.<sup>20</sup> The statute does not speak in terms of "necessary conditions" and "sufficient conditions." It provides that restrictions must be imposed to the extent necessary *to assure* the maintenance of a viable domestic uranium industry. A restriction which is "necessary to assure" the realization of a particular goal is different from one that is a "necessary condition" of that goal. To "assure" is "to make safe" or "to make sure or certain"; "to make certain the coming or attainment of" something. *Webster's Third New International Dictionary* 133 (1976). In terms of respondents' logical categories, that which assures is more akin to a sufficient condition than a necessary condition. Thus, the actual language of the statute is more appropriately construed to mean that restric-

<sup>20</sup> Furthermore, respondents' interpretation does not support the judgment below. If respondents are correct in their assertion that Section 2201(v) requires that restrictions be imposed whenever they are a necessary (but not sufficient) condition of viability, then the judgment below must be reversed, because the lower courts held that there was no need to show that restrictions are necessary to assure viability in *any* sense.



tions must be imposed when they are a *sufficient* condition of viability, than to mean that restrictions must be imposed when they are necessary (but not a sufficient) condition of viability.

Furthermore, respondents' proposed interpretation would require DOE to engage in an unbounded exercise in hypothetical decisionmaking. It would not be enough to conclude that the imposition of restrictions, by itself, would not restore the viability of the domestic industry. In addition, the Secretary would also have to ask whether the imposition of restrictions, in conjunction with other hypothetical changes in the uranium market, or other hypothetical policy measures, would make the industry viable. Moreover, in undertaking this exercise in speculation, the Secretary would apparently have to *exclude* from consideration hypothetical market changes or policy measures that would *by themselves* restore the industry to viability, because with respect to these events the restriction on enrichment services would not be a "necessary condition" of viability. For example, with respect to the specific suggestion made by respondents (Br. in Opp. 14), the Secretary would have to ask whether restrictions on enrichment of foreign uranium, in conjunction with a hypothetical prohibition on imports of special nuclear material by the Nuclear Regulatory Commission, would make the industry viable. If DOE concluded that the two actions together would make the domestic industry viable, it would have to impose restrictions, even though DOE has no power to ban imports of special nuclear material,<sup>21</sup> and

<sup>21</sup> Importation and distribution of enriched uranium requires a license from the Nuclear Regulatory Commission (NRC) (42 U.S.C. 2077(a); see 42 U.S.C. 2073(a) (authorization to issue licenses); 42 U.S.C. 2201(b) (authorization to regulate the "possession and use" of special nuclear material "to promote the common defense and security or to protect health or to minimize danger to life or property")). Licensing authority was originally conferred on the AEC by the Private Ownership Act, which for the first time allowed private per-

even though its restriction of enrichment services, standing alone, would do nothing to restore the domestic uranium industry to viability. On the other hand, if DOE concluded that a prohibition on imports of special nuclear material would itself restore the viability of the domestic industry, then it would *not* have the authority to impose restrictions on enrichment of foreign uranium, because on this assumed state of affairs a restriction on enrichment would not be a necessary condition of viability.

The intellectual gymnastics required by respondents' interpretation of the statute would be unproductive, unsound, and unreviewable. Moreover, there is absolutely no suggestion in the statute or legislative history that Congress contemplated such an exercise. Section 2201(v), in directing DOE to assure viability, authorizes it to employ enrichment restrictions and enrichment restrictions alone; Congress chose a specific means to achieve a specific end and gave no directive concerning any other means. If Congress had wanted the agency to engage in a wide-ranging analysis of enrichment restrictions in conjunction with other possible actions by other actors it would have

sons to own special nuclear material (§ 5, 78 Stat. 603). In response to questioning from the Joint Committee at the first set of hearings on the Private Ownership Act, the AEC's General Counsel expressed the view that the agency's licensing authority could be employed to prevent the importation of enriched uranium that would compete with domestic uranium enriched by the AEC (1963 *Private Ownership Hearings* 30). The licensing provisions of the Private Ownership Act, however, contained no requirement parallel to Section 2201(v) that licensing authority be used to assure a viable domestic industry. Indeed, a proposal that would have required the criteria for the issuance of licenses to include the maintenance of a viable domestic uranium industry (see 1964 *Private Ownership Hearings* 198) was specifically rejected (see p. 32 n.23, *infra*). We know of no occasion on which the AEC or the NRC has denied a license to import or resell uranium in order to protect the domestic uranium industry.



spoken in far different words than those which were chosen.

**B. The Legislative History of Section 2201(v) and Subsequent Congressional Treatment of This Issue Demonstrate That Congress Has not Required That Enrichment Restrictions be Imposed Whenever the Domestic Uranium Industry is not Viable**

1. The Private Ownership Act was enacted during a time of considerable optimism about the future of the nuclear industry in the United States. The Joint Committee on Atomic Energy reported that "great strides" had been made in the development of civilian nuclear power since 1954 (*Private Ownership Act Report* 8): "Spurred on by Government encouragement and assistance, significant progress has been made in reducing the cost of nuclear power during this period." (*ibid.*). Noting estimates provided by the AEC in 1962 of steadily mounting nuclear power capacity through 1980, the Joint Committee reported that these estimates had recently been revised upward by "some 70 to 150 percent" (*ibid.*). In this context, the Joint Committee recommended that private ownership of special nuclear material be authorized in order to facilitate private planning for the future and to eliminate the burden on the government of maintaining and leasing large quantities of special nuclear material to the private sector.

The prospects for the domestic uranium mining and milling industry were also viewed in largely optimistic terms. As the Joint Committee stated (*Private Ownership Act Report* 10):

Only a decade ago, the United States was a have-not Nation in terms of discovered and developed uranium reserves. The Atomic Energy Commission by extending substantial incentives to American industry, embarked upon an ambitious program of exploration

for uranium—the raw material essential to both the nuclear weapons program and the development of peacetime applications of atomic energy. As a result of this effort, the United States has, today, among the largest uranium reserves in the world, and, also, we have created a substantial uranium mining and milling industry.

Nevertheless, the Joint Committee expressed some concern about the viability of this new industry in the near-term. The government had recently announced cutbacks in the purchase of special nuclear material for military purposes (*ibid.*), and the projected increases in demand for uranium for private nuclear power purposes might not materialize as soon as predicted. For this reason, in preparing for the 1964 private ownership hearings, the Joint Committee had asked participants to address the question whether restrictions should be imposed on either "the importation of foreign uranium concentrates for enrichment and ultimate sale on the domestic market" or the "the importation of foreign-enriched uranium" (1964 *Private Ownership Hearings* 360).

In response to that inquiry, the AEC stated its "intent not to toll enrich uranium of foreign origin [for domestic use] \* \* \*. This restriction would be removed July 1, 1975, when the civilian requirements are expected to be sufficiently high that the viability of the domestic industry would no longer be at stake." 1964 *Private Ownership Hearings* 5 (statement of AEC Chairman Seaborg). In response to further questions, Chairman Seaborg expressed the Commission's preference for enrichment restrictions over import tariffs, because the latter would be "a complicated field to enter for such a short period" (*id.* at 23).

One major uranium mining and milling concern, the Kerr-McGee Company, opposed the AEC's proposed moratorium on enrichment of foreign uranium. See *1964 Private Ownership Hearings* 196-198.<sup>22</sup> Instead of a fixed period of restriction, Kerr-McGee suggested that the AEC "not extend its services to [foreign uranium] intended for domestic use to the extent necessary to assure the development of a viable domestic uranium mining and milling industry" (*id.* at 198). This alternative, the company argued, would give the AEC "the flexibility to adjust protection to the actual situation" as it developed, rather than being bound by a rigid timetable (*id.* at 197). In effect, a flexible standard would allow the AEC to determine "whether protection is to be afforded and the extent and precise nature of such protection" (*ibid.*) and would enable the AEC to provide "such protection as may become necessary but only to the extent that it is necessary" (*ibid.*).

The Joint Committee accepted this aspect of the Kerr-McGee proposal.<sup>23</sup> The committee report explained that

<sup>22</sup> There was some debate over the desirability and proper scope of protection for the domestic industry. The Edison Electric Institute, an electric utility trade association, favored "a free market situation where electric utility systems will have access to all sources of uranium ore" but agreed that "temporary restrictions on foreign uranium ore importation may be necessary to assure the maintenance of a sound domestic mining industry" (*1964 Private Ownership Hearings* 47). One witness from the uranium industry stated that his company was "not concerned about 'low cost' foreign uranium destroying our domestic industry" and, in response to the question whether he had any fear of foreign competition, replied that his company "would not have any fear based on that premise" (*id.* at 207, 212-213 (statement of Robert W. Adams, President and Chairman of the Board, Western Nuclear, Inc.)).

<sup>23</sup> The Joint Committee did not embrace, and Congress did not adopt, all that Kerr-McGee suggested. Kerr-McGee had also proposed that the maintenance of a viable domestic uranium mining and milling industry be added to the statutory purposes of the AEC, and that the

it preferred this approach to the fixed deadline proposed by the AEC because it imposed "a flexible restriction" that would allow the AEC "to review periodically the condition of the domestic and world uranium market and to offer enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium mining and milling industry" (*Private Ownership Act Report* 16). The Committee elaborated (*id.* at 31):

The direction to the Commission not to offer services under this subsection for uranium of foreign origin is flexible both as to duration and degree of the restriction. While it is possible that by 1975 substantial amounts of uranium could be freely imported into the United States for enrichment and sale on the domestic market, one cannot at this time predict, with any degree of certainty, the condition of the domestic uranium industry a decade hence.

Accordingly, the language of the bill will permit the Commission to survey periodically the condition of the domestic and world uranium markets and to offer or refuse to offer its enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium industry.

As this history suggests, Congress never considered the precise problem presented by this litigation. Section 2201(v) was enacted in order to maintain the viability of the domestic uranium industry as it passed from infancy to maturity; not to revive an industry caught in the throes of a sudden and precipitous decline. Nevertheless, the history

same objective be added to the criteria for the granting of licenses for importation and distribution of special nuclear material and source material (*1964 Private Ownership Hearings* 198). Neither of these suggestions was adopted. See also n.21, *supra*.



strongly suggests that Congress would have rejected the court of appeals' construction of the statute. The Joint Committee clearly had a very distinct objective in mind: the maintenance of a viable domestic industry. In order to achieve this objective, it expressly rejected the rigid approach proposed by the AEC: a complete moratorium on enrichment of foreign uranium until 1975. Instead, Congress adopted a flexible approach that requires the agency continuously to monitor market conditions and to formulate an opinion as to what level of restrictions, if any, would at any given time make the domestic industry viable.<sup>24</sup> In contrast, the court of appeals' construction ignores the purpose of the statute, and treats the imposition of restrictions as if it were an end in itself. The lower court's rigid and mechanical rule—"that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed and must become increasingly aggressive, to the point of 100% restriction" (Pet. App. 17a)—is exactly the opposite of the approach chosen by Congress.

2. Although Congress made a number of firm decisions in the Private Ownership Act—such as the decision to permit private ownership of enriched uranium—it was acutely aware of the unpredictable nature of the future, and of the inevitable need for periodic review and revision in the

<sup>24</sup> This is not to say, of course, that the agency (now DOE) has flexibility in deciding whether to comply with the statute (see pp. 25-26, *supra*). Rather, the statutory command is flexible in that it requires a level of restrictions that depends on DOE's expert judgement of the condition of the domestic industry and the effect that restrictions would have on that condition. The court of appeals seems not to have grasped this distinction; it interpreted DOE's finding that it could not achieve the statutory goal through the statutory mechanism as a decision "to abandon the statutory goal" (Pet. App. 18a). It is the court of appeals, however, and not DOE, that has lost sight of the provision's purpose.

legislation. As the Joint Committee expressed it (*Private Ownership Act Report* 19):

The future holds many uncertainties. The Congress and the executive branch will have to be continually alert to the effect of this legislation on the competitive structure of the atomic energy industry. \* \* \* In short, and in the words of the framers of the Atomic energy Act of 1946, 'It is recognized that many unforeseeable developments may arise in this field requiring changes in the legislation from time to time.'

In light of this commitment to revisit the statute in the event of "unforeseeable developments," it is significant that Congress *has* legislated on the question of the viability of the domestic uranium industry since the calamitous events of the late 1970's and early 1980's. Moreover, it is significant that Congress essentially *rejected* the solution to the problems of that industry imposed by the court of appeals in the decision below.

In March 1982, in direct response to the difficulties of the domestic uranium industry, the Senate approved a Nuclear Regulatory Commission authorization bill that would have limited imports of both natural and enriched uranium to no more than 20% of domestic nuclear fuel needs. See 128 Cong. Rec. 5751 (1982). When the authorization bill went to the Conference Committee, however, the Senate's approach was rejected in favor of a more moderate measure. The Conference proposal would have required DOE to modify its enrichment criteria so as to encourage greater consumption of natural uranium (but *not* to restrict enrichment of imported uranium) if imported uranium exceeded 37.5% of domestic requirements in any consecutive two-year period. *Id.* at 26799-26801. The Conference Committee further proposed that DOE be required to report annually on the viability of the domestic



uranium industry, that DOE findings be made the trigger for investigations under the trade laws by the United States Trade Representative and the Secretary of Commerce, and that, during the pendency of an investigation by the Secretary of Commerce, any new contracts for uranium imports would be unlawful. *Ibid.*

Yet even this compromise measure endorsed by the Conference Committee met with vehement opposition on the House floor. See 128 Cong. Rec. 28537-28544 (1982). Leading the debate, Congressman Frenzel denounced restrictions on foreign uranium as an "unfair[] trade barrier" (*id.* at 28537) that would "bypass[] the injury test required in our [trade] law" despite the fact that "[t]he domestic uranium industry's problem is not imports, but a low demand" (*ibid.*). Any provision that might lead to mechanical imposition of restrictions was specifically criticized as "bad economic policy, \* \* \* bad politics, \* \* \* bad government" (*id.* at 28539 (remarks of Rep. Gibbons)).

The opponents of the Conference Committee proposal recognized that "we have a problem" in the uranium industry, but argued that restricting imports "not only misanalyze[s] the cause of the problem but \* \* \* will exacerbate other problems that we have not just with trade, but also in terms of nonproliferation" (128 Cong. Rec. 28540 (1982) (remarks of Rep. Markey)). "[L]imiting competition for foreign uranium imports," they concluded, would "not \* \* \* accomplish" the rejuvenation of the domestic industry and would be "both inequitable and shortsighted" (*id.* at 28543 (remarks of Rep. Gore)). This view prevailed and, by a vote of 241 to 148, the House of Representatives rejected the Conference Committee report. *Id.* at 28543-28544.

Accordingly, the legislation that ultimately became Section 2210b was rewritten. See 128 Cong. Rec.

S15136-S15317 (daily ed. Dec. 16, 1982). As enacted, Section 2210b "simply provides for the study of the viability of the domestic uranium mining and milling industry" (128 Cong. Rec. H10462 (daily ed. Dec. 20, 1982) (remarks of Rep. Frenzel)). Congress specifically repudiated the suggestion that "any specific level of imports should govern \* \* \* import restrictions or relief," and reaffirmed that the Executive Branch "should be able to act as [it] sees fit, and not be bound by the import percentage which generated the study" (*id.* at H10463 (remarks of Rep. Frenzel)).

The 1982 legislative history takes on new meaning when considered in light of Congress's express commitment in 1964 to respond to unforeseen developments with new legislation. In enacting Section 2210b in 1982, Congress directly confronted a problem that was not foreseen in 1964—the sudden collapse of a mature domestic uranium industry—and expressly rejected a solution that would have imposed a mandatory restriction on uranium imports. Significantly, the reason Congress rejected a mandatory cutoff was, at least in part, because of a recognition that such a measure would "not accomplish" its intended result (see p. 36, *supra*). The court of appeals, by construing Section 2201(v) to require an automatic cutoff of all enrichment services to foreign uranium, even though the Secretary has concluded that this would not accomplish the statutory goal, has essentially awarded respondents the relief they were denied by Congress. Such a result would of course be required if it were compelled by Section 2201(v), but it is manifestly improper when the language of the statute in fact supports the opposite conclusion.

**C. To The Extent That The Court Of Appeals' Decision Rests On Implicit Rejection Of DOE's Factual Findings and Legal Premises, It Is Clearly Incorrect**

**1. Fact Finding**

The court of appeals may have disagreed with the Secretary's interpretation of Section 2201(v) in part because it assumed certain facts—not on the basis of any record below and contrary to the Secretary's view—about the effects of restrictions on the domestic uranium industry. The court found that Section 2201(v) “instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed \* \* \* *until the domestic industry is rejuvenated and becomes viable*” (Pet. App. 17a (emphasis added)). Similarly, the court of appeals stated that “DOE cannot accomplish its statutory purpose—the maintenance of a viable domestic uranium industry—*without imposing restrictions*” (*id.* at 18a (emphasis added)), and that when the domestic industry is not viable, DOE must impose “and continue to increase restrictions *until the domestic industry becomes viable*” (*ibid.* (emphasis added)).

Underlying all these statements is the unstated premise that restrictions *would* lead to viability. But the court of appeals had no warrant for assuming or relying on any such finding. The district court did not find that restrictions on enrichment of foreign uranium would lead to viability; it had made no factual record at all, because it held that the only fact that mattered was one as to which the parties agreed—that the domestic industry was not viable. The court of appeals ostensibly adopted the same approach, while nevertheless apparently assuming (contrary to DOE's uncontradicted assertion) that restrictions would produce viability.

There are, of course, circumstances in which restrictions on enrichment of foreign uranium would raise the price of uranium enough to revive the domestic industry—Section 2201(v) assumes as much. But the Secretary concluded that in the present circumstances—where the world uranium market suffers from chronic oversupply, where DOE has lost its monopoly on enrichment services,<sup>25</sup> and where there is an active secondary market in enriched uranium—the exact opposite is true. On respondents' motion for summary judgment, the court of appeals was required to accept the Secretary's factual assertions as true. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-588 (1986), citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). If the court of appeals was unwilling to accept the Secretary's unchallenged assertions, the proper course, at most, would have been to reverse the grant of summary judgment for respondents and remand for further appropriate proceedings. What was manifestly improper, however, was in effect to try to have it both ways—to assert that the effect of restrictions on viability is legally irrelevant, and yet to draw comfort from an unstated assumption that restrictions would in fact serve the statutory goal. To the extent that the court of appeals may have adopted this line of reasoning, its decision should be reversed.<sup>25</sup>

<sup>25</sup> Alternatively, the court of appeals may have attributed this view of the facts to Congress, reading into Section 2201(v) a conclusive presumption that total restrictions, if maintained long enough, would bring about viability. The statute itself, however, nowhere suggests that Congress had such an attachment to a particular factual hypothesis, and the history of the Atomic Energy Act contains repeated expressions of Congress's realization that the factual circumstances surrounding nuclear power change constantly (see, e.g. S. Rep. 1699, 83d Cong., 2d Sess. 1 (1954)). Moreover, to view Congress



## 2. Viability

The court of appeals' apparent view of the facts may also have been influenced by an unstated assumption about the meaning of viability under Section 2201(v). The definition of this crucial statutory term has never been considered in this litigation. All parties agreed, before the district court ruled, that the domestic uranium industry is not viable. Since then, respondents have maintained, and the lower courts have held, that this stipulation, by itself, is enough to trigger an obligation to impose restrictions. For that reason, the courts in this case have conducted no inquiry into the meaning of viability.

Nevertheless, the court of appeals may have been operating under an implicit understanding of viability that differs from that of DOE. In DOE's view, a "viable" domestic uranium industry is one that can fulfill, at an acceptable cost, the nation's needs for special nuclear material used in both military and civilian applications. This is consistent with the purpose of Section 2201(v): Congress believed that a viable domestic uranium industry was important, not for its own sake, but because of its contributions to national security and energy goals (*Private Ownership Act Report* 30). But whatever viability was thought to mean in 1964, the 1982 amendments have eliminated any doubt about the meaning of this term. The statutory criteria adopted by Congress in Section 2210b clearly define viability primarily in terms of the industry's size, strength and costs. See 42 U.S.C. 2210b(c)(2), (4), (5), (6), (7) and (8). Similarly, the Secretary's criteria focus

as permanently binding an agency with a conclusive factual presumption is to ignore the usual relationship between Congress and the Executive, in which expert agencies apply congressional policy to changing facts (see, e.g., *United States v. Shimer*, 367 U.S. 374, 382 (1961)).

on "the extent to which the domestic mining and milling uranium industry will be capable, at any particular time, of supplying the needs of the domestic nuclear power industry" (48 Fed. Reg. 45747 (1983)). Accordingly, in making viability assessments under Section 2210b, DOE has consistently focused on the industry's ability to fulfill the nation's nuclear energy requirements. See, e.g., Energy Info. Admin., Dep't of Energy, *Domestic Uranium Mining and Milling Industry: 1985 Viability Assessment* 49-59 (1986); 10 C.F.R. Pt. 761 (viability criteria).

It is possible that the court of appeals may have understood viability differently—not in terms of the capability of the domestic uranium industry to serve the nation's needs, but in terms of its *profitability*. The two concepts are obviously related, because an industry that is economically unprofitable will eventually lack the strength and capacity to serve the nation. But the converse is not true: an industry may be very small and profitable, and yet lack the ability to satisfy the nation's nuclear requirements.<sup>26</sup> The distinction is important because a court that assumes that viability involves nothing but profitability would be much more likely to assume, as the court

<sup>26</sup> In this regard, it is significant that domestic production of uranium, although significantly curtailed, has not ceased. See Energy Info. Admin., Dep't of Energy, *Uranium Industry Annual 1986* at 36-37 (1987) (production figures). Moreover, although the Secretary found that the domestic industry was not viable in 1986, there are indications that the industry may be contracting to the point where the surviving producers will be profitable (see Energy Info. Admin., *Domestic Uranium Mining and Milling Industry: 1986 Viability Assessment* 54-55 (1987)). But because the Section 2210b viability criteria focus on the industry's supply capacity and not just its financial condition, it is entirely possible that a profitable industry would nevertheless be too small to be viable in the statutory sense prescribed by Section 2201(v).



of appeals apparently did in this case, that a complete restriction on enrichment of foreign uranium would restore the domestic industry to "viability." On the other hand, a court that shares DOE's and Congress's understanding—that the industry's viability depends heavily on its ability to fulfill the nation's nuclear requirements at an acceptable cost—would be much less ready to assume that a complete restriction on enrichment of foreign uranium would eventually yield a "viable" domestic industry.

Again, if there were any question about the proper meaning of viability, the correct course would have been to reverse and remand for further consideration of this issue. Of course, under the court of appeals' professed theory of Section 2201(v) the meaning of viability is irrelevant. Once the domestic uranium industry is found not to be viable—whatever that might mean—then restrictions on enrichment of foreign uranium "must be imposed and must become increasingly aggressive, to the point of 100% restriction" (Pet. App. 17a). It is on that conclusion that the Tenth Circuit's judgment must stand or fall, and that conclusion was error.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE  
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OCTOBER TERM, 1987

F. CLARK HUFFMAN, *et al.*,  
*Petitioners,*  
v.

WESTERN NUCLEAR, INC., *et al.*,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit

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### QUESTION PRESENTED

Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v), provides that the Department of Energy ("DOE"), "to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer [enrichment] services" for foreign-source uranium destined for domestic use.

The question presented is whether Section 161(v) requires DOE to restrict enrichment of foreign-source uranium when the domestic uranium industry is not viable.



**PARTIES TO THE PROCEEDING  
AND STATEMENT PURSUANT TO  
SUP. CT. RULE 28.1**

The petitioners are the United States Department of Energy ("DOE") and the following officers or employees of DOE who were sued in their official capacities: John S. Herrington, Secretary of Energy, F. Clark Huffman, Sherry E. Peske, Philip G. Sewell, James W. Vaughn, and Joseph F. Salgado.

Respondents are Western Nuclear, Inc., Energy Fuels Nuclear, Inc., and Uranium Resources, Inc. Western Nuclear, Inc. is a wholly-owned subsidiary of Phelps Dodge Corporation. Energy Fuels Nuclear, Inc. is wholly owned by JRA Enterprises, Ltd., a Colorado limited partnership. The sole general partner of JRA Enterprises, Ltd. is John R. Adams.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

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No. 87-645

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F. CLARK HUFFMAN, *et al.*,  
*Petitioners,*  
v.

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*Respondents.*

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On Writ of Certiorari to the  
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for the Tenth Circuit

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**BRIEF FOR THE RESPONDENTS**

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**STATEMENT**

**A. Introduction**

Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v), authorizes the Department of Energy ("DOE")<sup>1</sup> to provide uranium enrichment services for operators of nuclear reactors.<sup>2</sup> That authorization

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<sup>1</sup> Initially, the Atomic Energy Commission ("AEC") was responsible for administering all provisions of the Atomic Energy Act, including Section 161(v). DOE has succeeded to the AEC's responsibilities under Section 161(v), while primary authority over licensing and related matters now rests with the Nuclear Regulatory Commission ("NRC"). See p. 28, *infra*.

<sup>2</sup> As the court of appeals explained (Pet. App. 4a), natural uranium cannot be used directly as fuel in nuclear reactors:

Natural uranium consists of less than one percent U-235, and nuclear fuel must contain approximately three percent U-235. Thus, to be used as nuclear fuel, uranium must have a higher concentration of U-235 than is found in nature. The process that produces this high concentration is called "enrichment."

is subject to a number of limitations, including the following proviso:

That the [Department], to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such [enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.

This case involves the proper interpretation of the Section 161(v) proviso. It is undisputed that Congress' goal was to ensure the continued viability of the domestic uranium industry. Both courts below concluded that Section 161(v) embodies a congressional determination that restrictions on enrichment of low-cost foreign uranium would accomplish the statutory goal, and that the statute directs the agency to impose such enrichment restrictions unless and until the domestic industry's viability is assured.

Petitioners concede (Pet. Br. 39) that the statute rests on Congress' assumption that enrichment restrictions would cause the price of uranium to increase and thus would ensure the maintenance of a viable domestic uranium industry. Petitioners also concede that the domestic uranium industry is not now viable and has not been viable for several years. They contend, however, that certain changes have occurred since the enactment of Section 161(v) that make it unlikely that imposition of restrictions on enrichment of foreign uranium would, standing alone, return the domestic industry to a condition of viability. This contention is based on a "determination" by DOE that is not part of the record in this case and that, as Congress has explicitly directed, may not be used in resolving the statutory construction question presented here.

In any event, as shown below, DOE may not ignore the statutory mandate because, in its view, as a result

of changed circumstances, compliance with the statute would not achieve the statutory goal. Instead, the agency's only recourse is to request Congress to amend the statute. Congress has considered such requests in recent years, but thus far it has refused to rewrite the statute to alter DOE's statutory duty.

## B. Statutory and Regulatory Background

### 1. Enactment of Section 161(v)

Congress enacted Section 161(v) in 1964, as part of the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602 (hereinafter Private Ownership Act), which permitted ownership of uranium by private entities and authorized the AEC to enter into contracts for the enrichment of privately-owned uranium at non-discriminatory prices. Passage of Section 161(v) followed extensive hearings at which representatives of the AEC, the electric utility industry and uranium producers generally agreed upon the need to provide protection to assure the continued existence of the emerging domestic uranium mining and milling industry.<sup>3</sup>

In a report recommending the enactment of the Private Ownership Act, the Joint Committee on Atomic Energy noted that ten years earlier, the United States had been "a have-not Nation in terms of discovered and developed uranium reserves." S. Rep. No. 1325, 88th Cong., 2d Sess. 10 (1964). That condition had been overcome by the AEC's program of "extending substantial incentives to American industry," which then "embarked upon an ambitious program of exploration for

<sup>3</sup> See *Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 88th Cong., 1st Sess. (1963)* (hereinafter 1963 Hearings); *Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 88th Cong., 2d Sess. (1964)* (hereinafter 1964 Hearings).

uranium." *Id.* The Joint Committee reported that as a result of this effort, the United States "has today [] among the largest uranium reserves in the world, and, also, we have created a substantial uranium mining and milling industry." *Id.*

Despite this growth, the Joint Committee noted that the new mining and milling industry was "completely dependent upon the Government" because at the time the Government was the only provider of enrichment services and was the only large-scale purchaser of uranium, principally for weapons. *Id.* Contemporaneous projections indicated, however, that the Government's future purchases of uranium would not be large enough "to support a viable domestic uranium industry beyond 1970," when the Government's existing uranium supply contracts were due to expire. *Id.*

By authorizing both private ownership of uranium and "toll enrichment" by the AEC of privately-owned uranium, the Private Ownership Act was intended to promote a "more normal commercial market" for natural uranium. *Id.* Under the Act, enrichment of privately-owned uranium was authorized to begin in 1969. While Congress was considering the legislation, some AEC officials proposed that the agency begin the enrichment of foreign uranium intended for domestic use in mid-1975, because by that time, "the civilian requirements are expected to be sufficiently high that the viability of the domestic industry would no longer be at stake." *Id.* at 30.

The Joint Committee recognized, however, that it was impossible to predict the condition of the domestic uranium industry a decade hence. *Id.* at 31. It noted that considerable concern had been expressed at the hearings regarding the "serious impact" that "substantial imports of foreign uranium for enrichment and sale on the domestic market" could have on the domestic uranium

industry, particularly during periods of "limited demand." *Id.* at 16. It further found the health of the domestic uranium industry to be "closely related to our vital defense and security interests." *Id.* at 17. The Joint Committee therefore "directed" the AEC, in Section 161(v), "not to offer uranium enrichment services" for foreign uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry." *Id.* at 16.<sup>4</sup>

## 2. The Agency's Initial Interpretation and Implementation of the Statute

The AEC originally took decisive action to carry out its obligations under Section 161(v). In 1966 the agency adopted "criteria" for the enrichment program that barred *any* enrichment of foreign-source uranium for domestic end use. 31 Fed. Reg. 16,479 (1966). For more than ten years, the enrichment of foreign-source uranium was prohibited entirely.

In 1968, the AEC advised Congress that any future relaxation of the enrichment restriction would be "consistent with reasonable assurance of the viability of the domestic uranium industry."<sup>5</sup> In 1972, the AEC Chair-

<sup>4</sup> Section 161(v) was not the only provision in the Private Ownership Act designed to safeguard national defense and security interests. Other provisions of the Private Ownership Act amended the Atomic Energy Act to authorize the AEC to restrict the importation of foreign-source uranium. Under Section 53(a) of the Atomic Energy Act, 42 U.S.C. § 2073(a), the AEC is authorized to issue licenses to import special nuclear material. Section 57(c) of the Act, 42 U.S.C. § 2077(c), provides, however, that the AEC "shall not . . . issue a license pursuant to Section 2073 to any person within the United States if the Commission finds that . . . the issuance of such license would be inimical to the common defense and security . . ."

<sup>5</sup> Atomic Energy Commission, 1968 Statement on Uranium Supply Policies and Related Activities, reprinted in *Status of the Domestic Uranium Mining and Milling Industry, The Effects of Imports: Hearings Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 415 (1981).



man testified that modification of the existing ban on enrichment of foreign-source uranium would be undertaken only if it was consistent with the maintenance of a viable domestic uranium industry. The Chairman explained that the restriction might be

adjusted so as to take an unbearable load off American suppliers, but would still permit the growth of American industry . . . . If there are American uranium reserves to be exploited, the intention would be that those reserves would be exploited.<sup>6</sup>

In 1974, the AEC concluded that the demand for uranium was likely to expand dramatically, and that restrictions on enrichment of foreign-source uranium could be phased out over a ten-year period without adversely affecting the viability of the domestic uranium industry. The agency proposed to begin removing the restrictions in 1977 and to lift all restrictions by the end of 1983. 39 Fed. Reg. 38,016 (1974).

AEC Chairman Anders assured Congress, however, that the restrictions would be reimposed if the viability of the domestic uranium industry were threatened:

Should there be any indication that the proposed schedule [of eliminating restrictions] is endangering domestic industry viability, U.S. self-sufficiency, or our national security, the Commission will reimpose restrictions or take such other steps as might be appropriate.<sup>7</sup>

Among the "other steps" referred to by AEC officials was the exercise of the agency's licensing authority

<sup>6</sup> *AEC Authorizing Legislation, Fiscal Year 1973: Hearings Before the Joint Comm. on Atomic Energy*, 92d Cong., 2d Sess. 2,328 (1972) (testimony of James R. Schlesinger).

<sup>7</sup> *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use: Hearings Before the Joint Comm. on Atomic Energy*, 93rd Cong., 2d Sess. 6 (1974) (hereinafter 1974 Hearings).

under the Atomic Energy Act to restrict imports of foreign uranium.<sup>8</sup>

Another AEC witness emphasized that, in the event of a massive increase in low-priced imports of uranium, "[we] will still be living under the restriction in the act that the viability of the domestic industry is the criterion"; that "we would be obligated under the act" to reimpose restrictions because of "the viability issue"; and that "the matter of the viability of the domestic industry is a legal requirement on the Commission under the Act."<sup>9</sup>

### 3. *Developments in the Uranium Industry*

Domestic production of uranium increased significantly in response to the AEC's predictions of increasing demand and also as a result of provisions in the AEC's enrichment contracts that required utilities to deliver uranium for enrichment irrespective of need.<sup>10</sup> Meanwhile, increased demand for nuclear fuel and the AEC's decision to cease taking new enrichment orders in 1974 also encouraged foreign entities to construct their own enrichment facilities, thus ending this country's monopoly over the provision of enrichment services for commercial nuclear reactors.<sup>11</sup>

In fact, the utilization of uranium in commercial reactors did not increase nearly as dramatically as the AEC had predicted. Orders for new nuclear reactors in the

<sup>8</sup> *Id.* at 8 (testimony of Bruce A. Mercer); *id.* at 232-233 (letter from AEC Chairman Ray to the Joint Committee). See p. 5, n.4, *supra*.

<sup>9</sup> *Id.* at 129, 134-135 (testimony of George F. Quinn).

<sup>10</sup> See C. Montagne, *The Federal Uranium Enrichment Program and the Criteria and Full Cost Recovery Requirements of Section 161 of the Atomic Energy Act*, 2 *Journal of Mineral Law & Policy* 1, 4 (1986).

<sup>11</sup> S. Rep. No. 100-214, 100th Cong., 1st Sess. 14-15 (1987).

United States declined drastically in the late 1970s and disappeared entirely after 1978. This created a glut in the uranium market and a corresponding decline in the price of uranium ore. Pet. App. 5a.<sup>12</sup>

As early as 1981, representatives of the domestic uranium industry requested DOE to reimpose restrictions on the enrichment of foreign uranium, but DOE refused then and has consistently refused since.<sup>13</sup> The result has been economic disaster for the domestic uranium industry. A recent report issued by the Senate Committee on Energy and Natural Resources summarizes the situation as follows:

The Energy Information Administration (EIA) of the Department of Energy found, in its 1985 report, that annual domestic uranium production was at its

<sup>12</sup> Nonetheless, according to recent DOE estimates, by the year 2000 domestic demand for uranium is expected to increase by approximately 14 percent and world-wide demand is expected to increase by 37 percent. See Energy Information Adm., DOE, *Domestic Uranium Mining and Milling Industry: 1986 Viability Assessment* 66, 83 (1987).

<sup>13</sup> Despite DOE's refusal to act, a DOE official reacted angrily in 1981 to a charge that DOE representatives may have suggested at a meeting with uranium company representatives that DOE would refrain from imposing enrichment restrictions even if the industry became non-viable. The Acting Director of DOE's Office of Uranium Enrichment and Assessment strongly denied that DOE had taken that position:

However, I am very concerned that you perceive that we at the Department of Energy (DOE) would disregard our obligations under Section 161e of the Atomic Energy Act. I cannot understand how you could have arrived at such an erroneous perception. Let me assure you that we take all of our obligations under the Act with the utmost seriousness. Furthermore, I have no recollection of saying that if we found the mining industry was not viable that we would not take steps to alleviate the situation. My staff at the meeting took fairly complete notes and there is no indication in their notes that I said anything like that.

J.A. 18 (emphasis added).

lowest level since the mid-1950's, while exploration and development drilling had dipped to their lowest points since the mid-1960's. The EIA also found employment down to 2,400 person-years in 1985 from 13,700 person-years in 1981. According to testimony given by the EIA before the Senate Committee on Energy and Natural Resources on March 9, 1987, the number of operating mines dropped to 3 in 1986, compared to 362 in 1979. Net earnings for the industry in 1984 and 1985 were negative.<sup>14</sup>

Meanwhile, as DOE has acknowledged, the percentage of foreign-source uranium enriched by DOE for domestic end use climbed steadily from 10 percent in 1981 to approximately 50 percent in 1986, and it continues to increase significantly.<sup>15</sup>

### C. The District Court Proceedings and Concurrent Administrative and Legislative Developments

After DOE persisted for three years in its refusal to reimpose enrichment restrictions, respondents, uranium mining and milling companies, filed this lawsuit in December 1984, seeking to compel DOE to take the action mandated by Section 161(v) to assure the viability of the domestic uranium industry. DOE, despite overwhelming evidence to the contrary,<sup>16</sup> continued to main-

<sup>14</sup> S. Rep. No. 100-214, *supra*, at 9.

<sup>15</sup> Peske Affidavit (June 23, 1986), Appendix to Appellants' Motion for Stay in Court of Appeals, at 87-88. DOE's 1986 viability assessment projects that "a growing portion of domestic utility requirements will be supplied by foreign-source uranium during the late 1980's. Throughout the 1990's, imports generally are projected to be more than 50 percent of projected domestic utility requirements." Energy Information Adm., DOE, *Domestic Uranium Mining and Milling Industry: 1986 Viability Assessment*, *supra*, at 68.

<sup>16</sup> The price for uranium plummeted from \$43.25 per pound in 1979 to \$15.50 per pound in 1984. The 1984 price was less than one-half of domestic producers' average production costs. See Pet. Br. 8.

tain that the domestic industry remained viable,<sup>17</sup> and that no restrictions were needed. Pet. App. 6a.

In September 1985, however, while respondents' motion for summary judgment was pending before the district court, DOE issued a formal finding that the industry had not been viable for calendar year 1984. *Id.*<sup>18</sup> DOE subsequently found that the industry was not viable in 1985 and 1986. Pet. Br. 12. The parties agree that the industry continues to be non-viable.<sup>19</sup>

Following DOE's September 1985 determination of non-viability, respondents contended that, given the concededly non-viable state of the domestic uranium industry, Section 161(v) required DOE to take action to restrict enrichment of foreign-source uranium, to the extent necessary to assure the viability of the industry. Petitioners contended that respondents could not complain of DOE's inaction under Section 161(v) because DOE had been given full and unreviewable discretion to decide whether or not to impose enrichment restrictions, and because respondents had cited no facts to show that enrichment restrictions would, in fact, assure the maintenance of a viable domestic industry.<sup>20</sup> DOE argued

<sup>17</sup> See Energy Information Adm., DOE, *Domestic Uranium Mining and Milling Industry: 1983 Viability Assessment* (1984).

<sup>18</sup> DOE made its determination pursuant to Section 170B of the Atomic Energy Act, 42 U.S.C. § 2210b, which requires DOE to make an annual assessment of the industry's viability. Before Congress enacted Section 170B in 1983, DOE had failed to make an assessment of the viability of the industry since 1973. One of the purposes of Section 170B was "to compel the implementation of Section 161(v)." 128 Cong. Rec. 28538 (1982) (remarks of Rep. Lujan). See pp. 30-33, *infra*.

<sup>19</sup> Remarkably, DOE never found, prior to 1985, that the viability of the industry was threatened, even though the price of domestic uranium had collapsed and thousands of jobs had been lost.

<sup>20</sup> J.A. 39-47.

that its determination of non-viability "[did] not impose any additional duties on [DOE] under [Section] 161(v)." DOE added that the Secretary of Energy had referred the entire question of "causation and possible curative actions in the form of import controls" to the United States Trade Representative, based upon the Secretary's belief that the Trade Representative and "other Executive Branch agencies charged with international trade jurisdiction" were "the most appropriate forums for consideration of this complex problem."<sup>21</sup>

The district court granted respondents' motion for summary judgment. Pet. App. 22a-24a. On June 20, 1986, it entered an order requiring DOE (1) to restrict enrichment of foreign-source uranium to no more than 25 percent of its total enrichment activity for the remainder of the year; (2) to cease enrichment of foreign-source uranium entirely commencing in 1987 (and thus to return to the agency's practice from 1966 to 1977); and (3) to commence a rulemaking to determine whether "criteria less restrictive than those imposed by this order would assure the maintenance of a viable domestic uranium industry." *Id.* at 23a. DOE has never undertaken such a rulemaking.

Meanwhile, in September 1985, the district court entered summary judgment for respondents on a separate count of their complaint that challenged the validity of DOE's standard form enrichment contract on the ground that DOE had not satisfied certain procedural requirements attendant to modification of that contract.<sup>22</sup> Thereafter, in January 1986, DOE commenced a rulemaking proceeding to cure the procedural infirmities identified by the district court. Although the district court's narrow procedural ruling had not addressed

<sup>21</sup> J.A. 46-47 & n.14.

<sup>22</sup> The petition for certiorari does not address the merits of the district court's decision on this issue.



DOE's policy of refusing to reimpose restrictions on enrichment of foreign-source uranium, DOE's notice of proposed rulemaking expressed the agency's intent to continue that policy. 51 Fed. Reg. 8,624 (1986).

On July 29, 1986, more than one month after the district court's issuance of the order challenged here, DOE issued a final rule. 51 Fed. Reg. 27,132. With regard to the issue of enrichment restrictions, DOE determined that, notwithstanding the non-viability of the domestic uranium industry, it would not impose restrictions on the enrichment of foreign-source uranium. DOE made clear that its inclusion of this determination in the rule was intended to strengthen its litigation posture on appeal in the present case by seeking congressional approval of its current interpretation of Section 161(v):

DOE believes that the *Western Nuclear* judgment is erroneous. . . . DOE is mindful of the ongoing nature of the *Western Nuclear* litigation. Section 762.3 [the rule refusing to impose enrichment restrictions] is being adopted at this time, notwithstanding the *Western Nuclear* litigation, in order to formally record DOE's interpretation of section 161(v), to state DOE's determination that restrictions on enrichment of foreign origin uranium would continue to be inappropriate, to establish the criterion that will be applicable to the enrichment of foreign origin uranium, and to permit Congressional review of that criterion.

*Id.* at 27,134 n.4.<sup>23</sup>

<sup>23</sup> In the rulemaking, DOE attempted to justify its refusal to impose restrictions on the enrichment of foreign uranium. *Id.* at 27,134-38. DOE argued that Section 161(v) requires restrictions only if DOE makes a finding that such restrictions "are needed to, and in fact, will assure the maintenance of a viable domestic uranium industry." *Id.* at 27,134. DOE asserted that restrictions would not be sufficient to restore the viability of the domestic industry because restrictions would have the effect of increasing the cost of DOE's enrichment services, and DOE could not insure that its enrichment customers would not seek to have foreign uranium

Congress, upon review of DOE's rule, did not approve DOE's policy of refusing to reimpose enrichment restrictions. Instead, in October 1986, Congress enacted Section 305 of Pub. L. No. 99-500, 100 Stat. 1783-209, which provides, *inter alia*, that no provision of DOE's July 1986 final rule "shall affect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities." 100 Stat. 1783-210.

#### D. The Decision of the Court of Appeals

On July 20, 1987, the court of appeals affirmed the district court's order. Pet. App. 1a-21a. Noting that it was required to accord "great deference" to the agency's interpretation of the statute, *id.* at 14a-15a, the court nonetheless held that DOE's position was contrary to the express language and legislative history of Section 161(v), both of which, in the court's view, compel the conclusion that "if the domestic industry is not viable, the DOE must restrict enrichment of foreign uranium." *Id.* at 20a.

The court of appeals pointed out that "Congress considered a viable domestic industry to be vitally important to United States defense and security interests and did not want the United States to become dependent on foreign sources of uranium." *Id.* Furthermore, the court observed that DOE "cannot accomplish its statu-

enriched by DOE's lower-priced foreign competitors. *Id.* at 27,138-38. Furthermore, DOE asserted that, notwithstanding the poor health of the domestic uranium industry, DOE has a "responsibility to maintain a healthy enrichment program which transcends economic considerations." *Id.* at 27,137 (emphasis added). In other words, DOE claimed that enrichment restrictions would be inappropriate because they would conflict with other policy objectives unrelated to the viability of the domestic industry.

tory purpose—the maintenance of a viable domestic uranium industry—without imposing restrictions on enrichment of foreign uranium. Rather, the DOE proposes to abandon the statutory goal.” *Id.* at 18a. The court concluded:

The unambiguous language of the statute requires the DOE to refuse enrichment of foreign uranium “to the extent necessary to assure” a viable domestic industry. The DOE may determine how much restriction is required to ensure viability, but it cannot decide not to impose restrictions when the industry is not viable. It must continue to increase restrictions until the domestic industry becomes viable. The DOE’s argument that this policy is not wise in the present uranium market should be made to Congress and not to the courts. We can only apply the statute as Congress passed it.

*Id.*

#### SUMMARY OF ARGUMENT

Section 161(v) represents a legislative mandate to DOE to maintain the viability of the domestic uranium industry. It prescribes one method by which DOE is to perform that function: by restricting the enrichment of foreign-source uranium. It embodies a congressional judgment that a viable domestic uranium industry is vital to United States national security and defense interests, and represents a congressional prescription as to how that viability is to be assured.

A. Section 161(v) states that DOE “shall not offer” enrichment services for uranium of foreign origin destined for use in domestic facilities; the statute requires that this prohibition be observed “to the extent necessary to assure the maintenance of a viable domestic uranium industry.” This language commands DOE to restrict the enrichment of foreign-source uranium unless and until the viability of the domestic uranium industry is assured. Thus, it is only when the viability of the

domestic industry is assured that DOE may offer enrichment services for foreign-source uranium. The phrase “to the extent necessary” authorizes DOE to determine the amount of enrichment restrictions necessary to assure a viable domestic industry; it does not grant DOE discretion to refuse to impose any restrictions at all when the industry’s viability is not assured.

Here, there is no question that the domestic uranium industry’s viability is not assured. DOE concluded that the industry was not viable during 1984, and it concedes that the industry has remained non-viable since. DOE nonetheless refuses to impose restrictions on the enrichment of foreign-source uranium.

Petitioners purport to justify DOE’s refusal to act by arguing that the statute gives DOE the discretion to decide whether enrichment restrictions are “necessary.” But petitioners have confused the question whether restrictions are *necessary* with the question whether they would be *sufficient* to assure the viability of the domestic uranium industry. To read the statute as if it said “sufficient” rather than “necessary,” as petitioners do, ignores the statute’s plain words.

B. The context and legislative history of Section 161(v) strongly support the conclusion that the statute mandates enrichment restrictions upon a finding of non-viability. Congress viewed the viability of the domestic uranium industry as essential to United States defense and national security interests. Congress clearly believed that the means it chose to preserve the industry’s viability—enrichment restrictions—would be fully effective. DOE’s decision not to follow the statutory command reflects a disagreement with the wisdom of the statute, but, as the court of appeals concluded, DOE’s policy concerns “should be made to Congress and not to the courts.” *Pet. App.* 18a.

C. Moreover, the structure of the Atomic Energy Act reinforces the notion that Congress believed that the

imposition of enrichment restrictions pursuant to Section 161(v) would assure the viability of the domestic uranium industry. Congress included in the Act provisions authorizing the AEC to utilize its licensing power to restrict imports of foreign uranium. By exercising its authority to restrict imports, the government can prevent its domestic enrichment customers from purchasing low-cost foreign uranium and having it enriched abroad. Thus, the government has at hand the means to make enrichment restrictions an effective tool for assuring the domestic industry's viability. DOE cannot refuse to take the action commanded by Congress to achieve the statutory purpose merely because DOE and other agencies have not taken other available actions that might render enrichment restrictions more efficacious.

D. There is no merit to petitioners' argument that the enactment in 1983 of Section 170B of the Act, 42 U.S.C. § 2210b, was intended to weaken the command of Section 161(v). To the contrary, by requiring DOE to make an annual assessment of the viability of the domestic industry, Section 170B was meant to close a loophole whereby DOE had evaded its responsibilities under Section 161(v) by failing to consider whether or not the domestic industry was viable.

E. Even if DOE's interpretation were not contrary to the language and history of the statute, it would not be entitled to any deference. In this regard, petitioners' reliance on *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986), is entirely misplaced. In *Young*, the agency had more than one available method with which to achieve the statutory goal, and chose one of those methods. Here, in contrast, DOE has refused to take the one action commanded by the statute and hence it has abandoned the statutory goal.

Furthermore, judicial deference is not owing to DOE's interpretation, because its present position conflicts with the position previously taken by the agency over the years.

In addition, the agency's present position is not entitled to any weight because it appears to be driven by DOE's preoccupation with concerns about its enrichment enterprise and with policies such as "free trade" that are clearly extraneous to the policy concerns that led Congress to enact Section 161(v).

Moreover, DOE's new-found interpretation improperly relies upon a "determination" that was made for the express purpose of obtaining congressional approval of its litigation position in this case. That determination has never been made a part of the record and was not even in existence at the time summary judgment was granted. Congress in fact rejected DOE's request for approval of its post-hoc rationalization. Instead, Congress foreclosed any reliance on DOE's determination by providing that "no provision" of DOE's July 1986 rules shall affect the merits of the statutory question presented in this case.

#### ARGUMENT

#### SECTION 161(v) EMBODIES CONGRESS' DETERMINATION THAT RESTRICTIONS ON ENRICHMENT OF FOREIGN-SOURCE URANIUM ARE NECESSARY TO ASSURE THE VIABILITY OF THE DOMESTIC URANIUM INDUSTRY AND MUST BE IMPOSED WHEN THE INDUSTRY'S VIABILITY IS THREATENED.

##### A. The Plain Language of the Statute Undermines DOE's Position That It Has Discretion To Ignore the Statutory Mandate.

Section 161(v) states that DOE "shall not offer" enrichment services for foreign-source nuclear materials destined for use in United States facilities "to the extent necessary to assure the maintenance of a viable domestic uranium industry." 42 U.S.C. § 2201(v) (emphasis added). There is nothing in the language of Section 161(v) that suggests that DOE has discretion to decide not to take steps to assure the maintenance of a viable



domestic industry by restricting the enrichment of foreign-source uranium. There also is nothing that suggests that DOE must make a finding, prior to imposing enrichment restrictions, that such action will in fact culminate in the desired result of a viable industry. To the contrary, the word "shall" is the language of command, and Congress, having determined that enrichment restrictions would help to ensure the maintenance of a viable domestic uranium industry, mandated that such restrictions must be imposed whenever the industry's viability is threatened.

Here, there is not merely a threat to the uranium industry's viability. For several years, the Secretary of Energy has made an affirmative finding that the industry is not viable. Therefore, Section 161(v) requires that DOE impose the remedy prescribed by Congress to assure the viability of the industry.

Contrary to petitioners' view, the phrase "to the extent necessary" does not permit DOE to avoid imposing restrictions simply by asserting doubts about whether restrictions will be sufficient to restore the industry to a condition of viability. The phrase "to the extent necessary" in ordinary idiomatic English usage, when used in a sentence directing a subject to take a specified action "to the extent necessary" to achieve a specified result, means that the action shall be performed until the specified result occurs. As the court of appeals correctly concluded, the phrase "to the extent necessary" "informs the DOE of the *amount* of restriction required; it does not provide a scenario in which the DOE is excused from restricting . . . enrichment [of foreign-source uranium] notwithstanding a nonviable domestic industry." Pet. App. 17a (court's emphasis).

This commonsense reading of the statute is bolstered by Section 161(v)'s directive to DOE—in the sentence immediately following the one at issue—to establish written criteria "setting forth . . . *the extent to which* [en-

richment] services will be made available" for foreign-source uranium intended for use in United States facilities. 42 U.S.C. § 2201(v) (emphasis added). Just as the phrase "the extent to which" in this sentence refers to the amount of enrichment services to be made available, so too the phrase "to the extent necessary" in the sentence at issue refers to the amount of restrictions to be imposed on enrichment services.<sup>24</sup>

Under the plain reading of the statute, therefore, DOE must restrict the enrichment of foreign-source uranium *unless and until* the viability of the domestic industry is assured. Conversely, it is only when the viability of the domestic industry is assured that DOE is authorized to offer enrichment services for foreign-source uranium. If the viability of the domestic industry is threatened, or if, as here, the industry concededly is not viable, DOE must continue to impose enrichment restrictions until viability is assured.

Petitioners themselves acknowledge (Pet. Br. 29) that Congress, in Section 161(v), "chose a specific means"—enrichment restrictions—"to achieve a specific end"—assuring the viability of the domestic uranium industry. Moreover, petitioners concede (Pet. Br. 39) that the central assumption underlying Section 161(v) is that restrictions on the enrichment of foreign-source uranium would assure the viability of the domestic uranium industry in the event the industry were threatened by large-scale imports of low-cost foreign uranium. Petitioners nevertheless resist the logical conclusion that flows from these concessions: that Congress, in enacting the statute, found that enrichment restrictions are "necessary" and must be

<sup>24</sup> The district court's order is fully consistent with this view of the statute. Although the district court ordered DOE to reimpose enrichment restrictions, it provided DOE with the flexibility of determining, through rulemaking, what level of restrictions would ensure the maintenance of a viable domestic industry. Pet. App. 23a.

imposed whenever viability is threatened. Petitioners can point to nothing in the statute that gives DOE the power to overrule that congressional finding.

This is what the court of appeals meant by its observation that Section 161(v) "instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed and must become increasingly aggressive . . . until the domestic industry is rejuvenated and becomes viable." Pet. App. 17a. Contrary to petitioners' surmise (Pet. Br. 38), the court was *not* making any tacit factual findings at variance with DOE's extra-record "finding" that restrictions would not be sufficient to produce viability. Rather, the court was simply reading the statutory command, consistent with its plain meaning, to permit DOE to enrich foreign-source uranium only if the domestic industry's viability is assured.

Furthermore, petitioners' interpretation of the statute is fatally flawed on its own terms because petitioners have confused the question whether restrictions are *necessary* with the question whether they would be *sufficient* to assure the viability of the domestic uranium industry. Petitioners do not claim that the domestic uranium industry cannot attain viability. They simply assert that the single act required by Section 161(v)—restricting enrichment of foreign-source uranium—would not *by itself* restore the industry. But that does not mean that restrictions are not *necessary*; it means only that, in petitioners' view, restrictions alone may not be *sufficient* to ensure viability. The sufficiency *vel non* of restrictions, however, is irrelevant under the statute.

Petitioners nonetheless argue that the statute must be interpreted as if it said "sufficient" rather than "necessary." They assert that the statutory phrase "necessary to assure" is somehow "more akin to a sufficient condition than a necessary condition," and that therefore "necessary" should be read as if it said "sufficient." Pet.

Br. 27-29. This verbal sleight-of-hand merely seeks to cloud the fact that petitioners have misread the statute. Restrictions clearly may be "necessary to assure" viability even though they might not, by themselves, produce viability.<sup>25</sup>

**B. The Context and Legislative History of Section 161(v) Strongly Support the View That Restrictions Are Mandatory, Not Discretionary, So Long As the Viability of the Industry Is Threatened.**

The Private Ownership Act represented a significant change in the regime applicable to fissionable nuclear materials such as uranium. When Congress was considering this major change in the applicable regime from public to private ownership, an overriding concern was the impact of the change on the domestic uranium industry, which before 1964 had been entirely dependent on purchases by the Government through the AEC. As the legislative history demonstrates, representatives of the domestic uranium industry were apprehensive about foreign dumping of excess or subsidized supplies at prices below those with which domestic suppliers could compete.<sup>26</sup>

<sup>25</sup> Petitioners' own analysis, moreover, confirms that restrictions are indeed "necessary." Petitioners' argument that enrichment restrictions would not assist the industry is in large measure premised upon DOE's lack of a complete monopoly on enrichment services. See Pet. Br. 14, 22. DOE is fearful that domestic utilities will contract with foreign enrichment enterprises in order to avoid an obligation to deliver only U.S.-origin uranium for enrichment. But petitioners' argument overlooks the fact that, as petitioners themselves acknowledge (Pet. Br. 28 n.21), the government is currently authorized by existing statutes and regulations to retain its domestic enrichment customers by restricting the importation of enriched uranium. See pp. 26-29, *infra*.

<sup>26</sup> See, e.g., 1963 Hearings, at 114-115 (testimony of representative of United Nuclear Corp.). See also *id.* at 145 (testimony of representative of AFL-CIO):

Under [certain proposed legislation], uranium ore can be imported and enriched at costs undercutting the cost of enriched



Industry representatives also expressed concern that there would be insufficient demand for uranium by nuclear-powered utilities to sustain a viable domestic uranium industry against low-cost foreign producers.<sup>27</sup> Loss of a viable domestic uranium industry was viewed by both uranium producers and consumers as contrary to basic United States interests.<sup>28</sup>

The AEC also acknowledged that "it [is] essential that [the domestic uranium] industry be maintained viable . . . ." <sup>29</sup> The Commission offered to bar enrichment of foreign-source uranium for domestic end-use as an administrative matter pursuant to its general authority under the Atomic Energy Act.<sup>30</sup> However, uranium producers, expressing concern about the reliability of a commitment to assure the viability of the domestic industry absent an express statutory obligation, called for specific legislation to address the issue.<sup>31</sup>

domestic ore. The effect of increasing imports of uranium ore by private processors under this legislation would be to reduce operations even further and to close down many uranium mines. This would cause a serious loss of jobs in the uranium ore mining and processing industry.

<sup>27</sup> See, e.g., 1964 Hearings, at 143 (testimony of representative of Anaconda Co.); *id.* at 154 (testimony of representative of Kerr-McGee Oil Industries).

<sup>28</sup> Thus, a representative of the Bechtel Corporation proposed that "[i]mportation of foreign uranium for toll enrichment or other use in the United States be permitted *but restricted to provide for a healthy U.S. uranium mining and milling industry.*" 1964 Hearings, at 66 (emphasis added). Similarly, a representative of General Electric expressed support for "*such protective steps as may be necessary to assure a healthy domestic uranium industry.*" *Id.* at 116 (emphasis added).

<sup>29</sup> *Id.* at 4.

<sup>30</sup> *Id.* at 5, 16-17.

<sup>31</sup> *Id.* at 155-156.

In response, the Vice Chairman of the Joint Committee requested Dean McGee, a spokesman for the industry, to propose legislation.<sup>32</sup> Mr. McGee proposed the language that ultimately became the criteria and enrichment limitation provisos in Section 161(v).<sup>33</sup> There was no "sunset" or other cut-off on this obligation. To the contrary, it was clearly intended to *limit* the agency's discretion to decline to impose enrichment limitations for as long as the provision remained in the statute.<sup>34</sup>

The Joint Committee on Atomic Energy emphasized that the enrichment restriction proviso was included in response to concerns

expressed during the committee's hearings over the effect on the domestic uranium industry of substantial imports of foreign uranium for enrichment and sale on the domestic market. It was pointed out that such importation could have a serious impact on the uranium mining and milling industry, particularly during a period of limited demand for its product.

S. Rep. No. 1325, *supra*, at 16.

<sup>32</sup> *Id.* at 195-196.

<sup>33</sup> The proposed legislation provided in pertinent part:

That the Commission shall establish criteria in writing setting forth the terms and conditions of making such production or enrichment services available and, in this regard, shall not extend its services to source or special nuclear materials of foreign origin intended for domestic use to the extent necessary to assure the development of a viable domestic uranium mining and milling industry.

*Id.* at 198.

<sup>34</sup> Section 161(v) is more emphatic on this point than the provision that was put forward by Mr. McGee. Whereas Mr. McGee's proposed version would have directed the AEC to restrict enrichment "to assure the *development* of a viable domestic uranium mining and milling industry," 1964 Hearings, at 198 (emphasis added), the legislation as enacted directs the agency to withhold enrichment of foreign uranium "to assure the *maintenance* of a viable domestic uranium industry." 42 U.S.C. § 2201(v) (emphasis added).



This view was echoed in statements made during the debates by supporters of the legislation. For example, Representative Morris remarked:

The flexible restriction on the enrichment of foreign uranium contained in this bill will protect our industry against ruinous competition from cheap foreign uranium. Our uranium industry is a vital link in the national defense and security. It has been built and nurtured by vast Government expenditures. The Joint Committee had the foresight to protect our investment in this industry during a possible period of limited demand for uranium.

110 Cong. Rec. 20145 (1964); *see also, id.* (remarks of Rep. Aspinall).

In short, Congress believed that "the measures taken in this bill to assure the viability of the domestic uranium industry" would, in fact, achieve that goal. S. Rep. No. 1325, *supra*, at 17. Furthermore, Congress intended the statute as a mandatory command "not to offer such [enrichment] services," *id.* at 30, when the uranium industry's viability is threatened.

To support their contrary position, petitioners point to the statement of the Joint Committee to the effect that Section 161(v) would impose a "flexible" restriction and would require the agency "to offer or refuse to offer enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium industry." S. Rep. No. 1325, *supra*, at 31. *See* Pet. Br. 33-34. But, as the Joint Committee explained, the term "flexible" in this context denotes, not flexibility as to whether or not to impose any restrictions when the viability of the domestic industry is threatened, but only flexibility "as to the duration and degree of the restriction." S. Rep. No. 1325, *supra*, at 31. Congress viewed Section 161(v) as a "flexible" alternative to a proposed ban on foreign enrichment that would have expired automatically after ten years. *Id.* at 30-31. Instead, Congress

enacted a flexible ban keyed to whether the viability of the domestic industry is threatened. Contrary to petitioners' contention (Pet. Br. 34), Congress' rejection of the "rigid approach" of an outright ten-year ban on enrichment of foreign uranium does not in any way imply that DOE is free to refuse to impose restrictions in the event the industry is not viable.

It is evident from the legislative history of Section 161(v) that Congress believed that the imposition of enrichment restrictions would in fact assure the viability of the industry under any imagined future scenario.<sup>35</sup> Congress therefore directed the agency to impose restrictions so as to maintain the industry's viability. Contrary to petitioners' contention, Congress did not undercut its own directive by granting discretion to DOE to second-guess the congressional judgment that enrichment restrictions would be effective in achieving the statutory purpose.

<sup>35</sup> It is precisely because Congress did not foresee a situation in which enrichment restrictions might be alleged to be ineffective to assure viability that petitioners' hypothetical of exhausted domestic uranium reserves (Pet. Br. 26) is meaningless as a tool of argument in this case. Apparently, the point of this hypothetical is to demonstrate that Congress could not possibly have intended to compel DOE to impose restrictions whenever the viability of the domestic industry is threatened, because Congress would have realized that this would lead to the "absurd" result that restrictions would be required even when domestic uranium reserves were exhausted. The example does not illuminate congressional intent, however, because it is highly unlikely that Congress, at the time it enacted Section 161(v), ever considered such a fanciful example—or, indeed, *any* situation in which enrichment restrictions would not produce viability. As the Joint Committee noted at the time, "the United States has, today, among the largest uranium reserves in the world." S. Rep. No. 1325, *supra*, at 10. Furthermore, it should be noted that Congress has exercised continuous oversight under the Atomic Energy Act to respond to changing conditions. Accordingly, if Section 161(v) ever became obsolete because of circumstances like those postulated by petitioners, it is certain that Congress would enact appropriate legislation to deal with the situation.

At bottom, petitioners' argument is that in the present circumstances—which allegedly were unforeseen by Congress—the imposition of enrichment restrictions would not, in DOE's view, actually assure the viability of the domestic uranium industry. This argument does nothing to advance the inquiry into congressional intent. Instead, it merely reflects DOE's disagreement with the continued wisdom of the statute and with the underlying congressional judgment that restrictions would assure viability. The court of appeals correctly concluded that this policy argument "should be made to Congress and not to the courts." Pet. App. 18a. See *TVA v. Hill*, 437 U.S. 153, 194 (1978).<sup>36</sup>

**C. The Structure of the Atomic Energy Act Confirms That Congress Viewed the Mandatory Authority Provided in Section 161(v) As Necessary To Assure the Industry's Viability.**

In enacting the Private Ownership Act in 1964, Congress believed that it had provided the AEC with sufficient authority to deal with any contingency that might threaten the viability of the domestic uranium industry. During the 1963 hearings, the AEC was asked what action could be taken if domestic utilities sought to defeat

<sup>36</sup> Congress in fact is currently considering legislation that would attempt both to assure the viability of the domestic uranium industry and to meet the concerns of DOE about the soundness of its enrichment enterprise. The legislation would replace Section 161(v) with a system of graduated charges payable by domestic reactor operators for the use of foreign uranium, and would turn DOE's enrichment enterprise over to a new Government-owned corporation. See S. Rep. No. 100-214, *supra* (favorable report by Senate Energy and Natural Resources Committee on S. 1846).

In discussing the need for the proposed legislation, the Senate Report refers to "a ban on DOE enrichment of foreign uranium" as being "mandated" by the Atomic Energy Act "upon a finding of non-viability." *Id.* at 10. The Report, to be sure, questions whether the results of such a mandatory restriction would be desirable, *id.*, but such arguments are relevant to whether the statute ought to be amended, not to what the statute means.

the purpose of a restriction on enrichment by purchasing foreign-source uranium, having it enriched abroad, and importing it for use in the United States. The AEC's representative responded that the agency would have the authority to prevent such an occurrence by promulgating regulations restricting such imports.<sup>37</sup>

At that time, the AEC's statutory authority to issue regulations limiting uranium imports was contained in Section 161(b) and (p) of the Atomic Energy Act, 42 U.S.C. § 2201(b) and (p). Pursuant to Section 161(b), the agency could restrict the "possession and use" of special nuclear material in order "to promote the common defense and security." 42 U.S.C. § 2201(b). In the Private Ownership Act, Congress provided the AEC with additional, more explicit, authority to restrict imports of special nuclear material. The new legislation amended the Atomic Energy Act to provide that the agency shall not issue an import license to anyone within the United States if it finds that the issuance of such a license "would be inimical to the common defense and security." 42 U.S.C. §§ 2073(a), 2077(c).

The Joint Committee made clear that the agency's prior licensing authority and its authority to issue rules governing the possession and use of uranium would continue notwithstanding the elimination of the requirement that all uranium be Government-owned. S. Rep. No. 1325, *supra*, at 20. The Committee noted further that the AEC was to be given explicit new authority to "regulate, by

<sup>37</sup> See 1963 Hearings, at 29-30:

[Rep. Hosmer:] What about a domestic user buying foreign ore, assuming that the United Kingdom toll charges are less than ours, having it processed, and then bringing it into the United States? Are you going to write in some protection in that regard, too?

[AEC General Counsel Joseph F. Hennessey:] This could be covered either under the agreement for cooperation with the foreign country or under our own import regulations.



licensing, imports . . . so as to safeguard . . . the common defense and security." *Id.* at 29.

At hearings in 1974 before the Joint Committee, an AEC representative confirmed that the statutory authority to restrict imports could be used, together with Section 161(v), to ensure the viability of the domestic uranium industry.

[Mr. Mercer.] Although we have indicated that we do not anticipate that the viability of the domestic industry would be threatened by this course of action [*i.e.*, the removal of enrichment restrictions,] should it become threatened and it is in the national security interest to see that it remains viable, there are alternative legal measures that one can take. . . . There is section 69 of our act where we can preclude import licensees [*sic*] in the interest of the common defense and security, we can preclude licensees [*sic*] for the import of source material. There is also section 161v—

[Representative Hosmer.] Does that include economic considerations, common defense and security?

[Mr. Mercer.] The common defense and security we consider now and was considered at the time the restriction was placed in the act is dependent to a degree on the viability of our domestic mining and milling industry to provide feed material. That was the basis in the first instance for section 161v.

1974 Hearings, at 8. *See also, id.*, at 232-233 (letter from AEC Chairman Ray to the Joint Committee) (noting availability of Section 57 import restrictions).

When the AEC was abolished, the authority to license imports was transferred to the newly-created Nuclear Regulatory Commission. Petitioners acknowledge (Pet. Br. 28 n.21) that the NRC may restrict the "possession and use" of special nuclear material in order "to promote the common defense and security." The clear thrust of petitioners' argument is that the imposition of enrichment restrictions, without also imposing import restrictions, would implicate such defense and security concerns

by threatening DOE's enrichment enterprise. Of course, the legislative history of Section 161(v) makes clear that Congress viewed the viability of the domestic uranium industry as also essential to the national security and defense. *See* pp. 5, 24, *supra*. In any event, if plaintiffs are correct that DOE's enrichment enterprise would be threatened by the imposition of enrichment restrictions, the government has available the authority provided by the Atomic Energy Act to restrict imports of uranium enriched abroad. The availability of import restrictions to prevent the defection of DOE's domestic enrichment customers confirms that the government has the means at hand to make enrichment restrictions under Section 161(v) a powerful tool for restoring the viability of the domestic uranium industry.

Furthermore, the fact that the NRC, rather than DOE, has licensing authority over uranium imports provides no basis for DOE to resist carrying out its mandated function under Section 161(v).<sup>38</sup> Before the AEC was abolished, that agency had sole authority to restrict both enrichment of foreign uranium and importation of uranium enriched abroad. In transferring the responsibilities of the AEC to the newly-created agencies, Congress could not have intended to permit DOE to avoid its statutory obligations through an Alphonse-Gaston approach to statutory construction.

<sup>38</sup> It should be noted in this regard that, under the NRC's regulations, a utility can obtain a "general" import license for enriched uranium if the utility is authorized to possess such material under a contract with DOE. 10 C.F.R. § 110.27(a)(1) (1987). Otherwise, the utility must apply for a "specific" import license covering each planned shipment (or series of shipments) of enriched uranium. *Id.* § 110.30 *et seq.* Thus DOE can exert a direct influence upon import licensing through the exercise of its contract power.



**D. Section 170B of the Atomic Energy Act Was Intended by Congress to Strengthen, Not Weaken, the Statutory Framework Supporting the Viability of the Domestic Uranium Industry.**

In 1983, when restrictions on the enrichment of foreign uranium were in the last stage of their gradual phase-out, Congress acted to strengthen the statutory requirements for assuring the viability of the industry. Congress enacted Section 170B of the Atomic Energy Act, 42 U.S.C. § 2210b, because DOE had failed to investigate the viability of the domestic industry since 1973, and had failed to prescribe any objective indicia for measuring that viability. Domestic uranium mining and milling companies alerted Congress that DOE was failing to live up to its obligations under Section 161(v) by continuing to assert that the domestic industry was viable despite mounting evidence to the contrary. Congress was concerned that DOE could escape its responsibility to assure the viability of the domestic industry by failing to monitor and formally determine the viability of the industry. It acted to close that loophole through enactment of Section 170B, which requires DOE to make annual viability determinations.

The legislative history of Section 170B makes Congress' intention to close DOE's "loophole" clear beyond question. Representative Lujan, one of the members of the Conference Committee that proposed enactment of Section 170B, remarked:

Congress has consistently recognized the importance of maintaining a viable domestic uranium industry . . . . We adopted Section 161(v) of the Atomic Energy Act directing the Atomic Energy Commission, now the Department of Energy, to take such actions in the provision of enrichment services as were necessary to maintain a viable domestic industry. The Department, to my sorrow, has failed to implement that provision . . . .

The uranium supply provision before us makes use of existing law to assure the maintenance of a viable uranium industry. It simply calls for the Department to issue criteria for determining viability and to make a viability determination . . . on an annual basis. *This will serve to compel the implementation of Section 161(v).*

128 Cong. Rec. 28538 (1982) (emphasis added).

Similarly, Senator Domenici, one of the leading sponsors of the legislation that became Section 170B, observed:

The Conference Committee also provides that the Secretary of Energy monitor and report on the viability of the domestic uranium industry on an annual basis from now until 1992. In making that report the Secretary would be required to submit a determination as to whether or not the domestic uranium industry is viable. *In the event that the Secretary were to find that the domestic industry was not viable, existing provisions in the Atomic Energy Act would provide the Secretary with the authority to help maintain the viability of the industry.*

128 Cong. Rec. S13054 (daily ed. Oct. 1, 1982) (emphasis added).<sup>39</sup> See also, H.R. Conf. Rep. No. 97-884,

<sup>39</sup> Senator Domenici subsequently explained that the need for a specific objective "trigger" initiating DOE's obligations pursuant to Section 161(v) was the primary motivation for passage of Section 170B:

[DOE] claims that the annual determination that we required the Secretary to make about the viability of the domestic mining industry was not related to the requirement contained in 161(v) of the act that the Secretary must maintain a viable domestic mining industry. I have said in the past that this is a false interpretation and I must, once again, call their attention to the transcripts of the conference committee on H.R. 2330. The very first time I introduced this concept to the committee on September 16, 1982, I stated that the reason it was needed was because while "the word viability; that is, the viability of the domestic industry is a trigger," for the Secre-

97th Cong., 2d Sess. 51 (1982) (Secretary of Energy's "annual viability assessment criteria will be used as the basis for carrying out his responsibilities . . . under . . . section 161v").

In the face of this legislative history, petitioners' contention (Pet. Br. 35-37) that Section 170B was intended to *weaken*, not strengthen, the statutory framework supporting the viability of the domestic uranium industry strains credibility. Petitioners' misguided argument relies in part on the fact that an earlier version of the legislation, which contained mandatory import restrictions on foreign-source uranium, was rejected when Section 170B eventually was enacted. However, petitioners fail to distinguish between mandatory *import* restrictions as originally proposed in the legislation and mandatory *enrichment* restrictions already authorized under Section 161(v), which Section 170B was intended to complement. The fact that Congress failed to enact the proposed mandatory *import* restrictions says nothing about its views on the pre-existing *enrichment* restrictions, except perhaps that, as recently as 1983, Congress continued to believe that Section 161(v), once implemented by DOE, would assure the viability of the domestic uranium industry and that direct, mandatory import restrictions would not be advisable.

Petitioners also point out that the Conference Committee proposed, but Congress failed to enact, a measure that would have called for automatic revision of DOE's enrichment criteria whenever the amount of contracted-for foreign uranium exceeded a fixed percentage (37.5 percent) of annual total domestic reactor demand. See

tary to assist the industry, "we have not been able to get any satisfactory measurement of viability, and so this provision would be an objective measurement. \* \* \*" Thus the clear purpose of section 170B was to provide that the Secretary carried out his responsibility under 161(v) by requiring a review of the viability of the industry on an annual basis.

132 Cong. Rec. S10132 (daily ed. Aug. 1, 1986).

H.R. Conf. Rep. No. 97-884, *supra*, at 17, 52. But viability was simply not an issue in the proposed legislation; revision of the enrichment criteria would have been required whether or not the domestic industry's viability was threatened. Accordingly, Congress' failure to enact this measure in no way implies a repudiation of the enrichment restrictions mandated by Section 161(v), which are keyed to the viability of the domestic industry rather than to a fixed percentage of imports.<sup>40</sup>

In sum, there is no merit to petitioners' argument that the enactment of Section 170B is somehow inconsistent with the interpretation of Section 161(v) later adopted by the courts below. To the contrary, Section 170B was intended to eliminate DOE's "discretion" to ignore the domestic industry's condition. It strengthens, rather than weakens, the statutory framework supporting the viability of the domestic industry.

#### **E. DOE's Interpretation Is Not Entitled To Deference and May Not Be Considered In Interpreting Section 161(v).**

Relying on this Court's decision in *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986), petitioners contend (Pet. Br. 23-25) that the Court must defer to DOE's interpretation of the statute. This contention is flawed for a number of reasons.

1. First, petitioners' reliance on *Young* is misplaced. The statute in *Young* provided that, when certain poi-

<sup>40</sup> Indeed, during the debate in which the 37.5 percent "trigger" provision was rejected, Representative Gibbons, a key opponent of the measure, argued that "[t]here are adequate remedies under the present law that have been in existence for a long time, so that [the domestic] uranium industry, if it is impacted as they think it is going to be impacted can go and get relief." 128 Cong. Rec. 28539 (1982). Representative Gibbons also referred to the availability of import restrictions to protect the domestic industry if national security were threatened. *Id.*



sonous substances were unavoidably present in food, "the Secretary shall promulgate regulations limiting the quantity therein or thereon to the extent that he finds necessary for the protection of public health." *Id.* at 977, quoting 21 U.S.C. § 346. The Court in *Young* deferred to the agency's long-standing interpretation that the phrase "to the extent that he finds necessary" modified "shall promulgate regulations." Under this interpretation, the Secretary had discretion to "find" to what extent it was necessary to promulgate regulations in order to fulfill the statutory purpose of the "protection of public health." The Secretary in *Young* had decided that "action levels," rather than formally-promulgated "tolerance levels," were a sufficient means of achieving the statutory purpose.

In this case, there is no dispute that the phrase "to the extent necessary" modifies the phrase "shall not offer such [enrichment] services." The critical distinction, however, is that in *Young* the agency had available alternative means for exercising its authority, and it determined that it could achieve the statutory purpose—the protection of public health—by one of those means. Here, in contrast, the method of achieving the statutory goal of ensuring the industry's viability has been prescribed by Congress: Section 161(v) requires DOE to restrict enrichment of foreign-source uranium. Thus, here, unlike in *Young*, the agency has abandoned the statutory goal by refusing to take the one action specified by Congress for achieving that goal.

Nor is petitioners' position grounded on a well-settled agency interpretation of the statute warranting judicial deference, as in *Young*. On the contrary, petitioners' present position directly conflicts with the position taken by the agency through the years. See pp. 5-7, *supra*. Thus, petitioners' current view of the statute need not be accorded any deference. See *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 n.30 (1987).

Furthermore, it would be error to defer to DOE's present interpretation, because the agency's newly-conceived view of the statute rests on concerns other than those underlying Section 161(v). Despite petitioners' lip service to the "purpose" of Section 161(v), DOE's refusal to take any action to assure the viability of the domestic uranium industry is driven by DOE's concern that, if enrichment restrictions are imposed, it may lose some enrichment business to foreign competitors, and by the present Administration's preference for a so-called "free trade" policy. See 51 Fed. Reg. at 27,137.<sup>41</sup>

Even accepting at face value the explanation proffered by petitioners for DOE's refusal to act, it is outrageous for petitioners to claim that DOE need not comply with the statute because, in DOE's view, restrictions would not, in and of themselves, suffice to restore the presently non-viable uranium industry to viability. For years, DOE ignored the pleas of the domestic industry that Section 161(v) required the agency to impose enrichment restrictions in order to maintain the industry's viability. Because DOE refused to act when the industry's viability was threatened, the industry became non-viable. Now that the industry is not viable, DOE continues to refuse to take any action.

If petitioners are correct, an agency like DOE could veto a congressional policy directive simply by sitting on its hands and ignoring its statutory obligations for a long enough period of time to render action under the statute ineffective. The Court should not countenance such an irresponsible and fundamentally lawless position.

2. Finally, petitioners improperly seek to draw support for their new interpretation from assertions set forth in DOE's July 1986 rulemaking, which was not

<sup>41</sup> Cf. S. Rep. No. 100-214, *supra*, at 95 (letter from Secretary of Energy to Chairman of Senate Committee on Energy and Natural Resources).



issued until after the district court had entered its order in this case rejecting petitioners' construction of Section 161(v). That rulemaking is merely a post hoc rationalization by the agency in support of its litigating position, and is entitled to no deference whatsoever. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80 (1943).<sup>42</sup>

Petitioners suggest (Pet. Br. 21, 38-39) that the court of appeals may have engaged in "extra-record fact-finding" in rejecting DOE's July 1986 "determination" that enrichment restrictions would not assure viability. On the contrary, it is petitioners who are asking this Court to engage in "extra-record fact-finding" by their reliance on a "determination" that was made after the district court's June 1986 ruling, and that therefore has never been part of the record in this case. For this reason, DOE's determination cannot be considered in passing upon respondents' motion for summary judgment. *See Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986).

Petitioners' reliance (Br. 13-15) on DOE's July 1986 rulemaking is foreclosed in any event by Congress' explicit directive, in Section 305 of Pub. L. No. 99-500, that "no provision" of DOE's July 1986 rules "shall affect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities." 100 Stat. 1783-210. By incorporating in the July 1986 rulemaking its rationale for failing to reimpose enrichment restrictions, DOE hoped to secure congressional approval of that policy. *See* p. 12, *supra*. Congress, however, refused to place its imprimatur on DOE's policy, and, instead, it expressly provided

<sup>42</sup> *See also* Anthony, *Which Agency Interpretations Should Get Judicial Deference—A Preliminary Inquiry*, 40 Admin. L. Rev. 121, 122 (1988) (suggesting that an agency's "self-judging" interpretive expressions do not merit judicial deference).

that DOE's rulemaking cannot be considered in resolving the issue presented in this case.<sup>43</sup>

## CONCLUSION

The judgment of the court of appeals should be affirmed.<sup>44</sup>

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March 1988

<sup>43</sup> Petitioners attempt to avoid the mandate of Pub. L. No. 99-500 by disclaiming any notion that they view that statute as "having ratified" DOE's interpretation of Section 161(v). Pet. Br. 15 n.12. But the problem remains that petitioners are urging the Court to decide this case based upon an agency determination that Congress has decreed shall be given no consideration. Consistent with the command of Congress, the Court should approach this case as it would if two private litigants were urging different interpretations of a statute. The Court's role in such a case is simply to declare what the statute means. *See SEC v. Sloan*, 436 U.S. 103, 117-118 (1978).

<sup>44</sup> This brief does not address the arguments presented by certain amici concerning the effect of the General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187. The GATT issue was not fairly presented by the petition for certiorari and thus is not appropriate for consideration by the Court. *See Sup. Ct. R. 21.1*. Under the interpretations proffered by amici, DOE would be utterly prohibited by the GATT from restrict-

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ing the enrichment of foreign uranium pursuant to Section 161(v) for whatever reason. Not even petitioners adhere to this extreme position. Moreover, Article 21 of the GATT contains an explicit exemption for a party's actions regarding fissionable materials.

In recommending enactment of Section 161(v), the Joint Committee concluded that the imposition of restrictions "on the performance of services" by the AEC would not be inconsistent with any obligations the United States might have under the GATT. S. Rep. No. 1325, *supra*, at 17. In any event, where a statute is inconsistent with a previously adopted treaty or executive agreement, the statute is paramount. See L. Henkin, *Foreign Affairs and the Constitution* 163 & n.111 (1972), discussing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). See also, Restatement of the Foreign Relations Law of the United States, § 135(a)(1) (Tent. Final Draft 1985).

(18)  
No. 87-645

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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**F. CLARK HUFFMAN, ET AL., PETITIONERS**

**v.**

**WESTERN NUCLEAR, INC., ET AL.**

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**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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**REPLY BRIEF FOR THE PETITIONERS**

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## REPLY BRIEF FOR THE PETITIONERS

In our opening brief, we demonstrated that the court of appeals' interpretation of Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. 2201(v), cannot be squared with the language, purpose and history of that provision. The court of appeals took a statute that requires the Department of Energy (DOE) to restrict enrichment of foreign uranium for a stated purpose—"to assure the maintenance of a viable domestic uranium industry" (*ibid.*)—and converted it into a blanket command that "if the domestic uranium industry is not viable, the DOE must restrict enrichment of foreign uranium" (Pet. App. 20a). Try as they may, respondents have failed to rehabilitate this remarkable transformation. Section 2201(v) states its purpose in plain terms and does not require enrichment restrictions that would not serve that purpose.<sup>1</sup>

<sup>1</sup> Respondents mischaracterize our position as the claim that "as a result of changed circumstances, compliance with the statute would not achieve the statutory goal" (Br. 2-3). Amici States (*e.g.*, Br. 18)



1. a. Respondents' principal argument is that Section 2201(v) should be read as incorporating an implicit finding of fact to the effect that restrictions on enrichment of foreign uranium will *always* assure the maintenance of a viable domestic uranium industry. See, e.g., Resp. Br. 2 ("Section [2201(v)] embodies a congressional determination that restrictions on enrichment of low-cost foreign uranium would accomplish the statutory goal \* \* \*"); see also *id.* at 15, 18, 19-20, 25. Congress of course *could* have made such a finding, and *could* have written it into the statute. But the plain language of the statute reveals that Congress did no such thing. Congress directed DOE to adopt a particular means (restrictions on enrichment of foreign uranium) "to the extent necessary to assure" a particular end (a viable domestic uranium industry). It did not declare, as a matter of law, that the means *always* would produce that end, no matter what the facts or circumstances might be in the future. Respondents can point to nothing in the statute that even resembles such a factual finding.

Nor does the legislative history suggest that Congress intended to enact any factual finding directly into law. The Joint Committee on Atomic Energy emphasized (S. Rep. 1325, 88th Cong., 2d Sess. 19 (1964) [hereinafter *Private Ownership Act Report*]) that "[t]he future holds many uncertainties" and that "many unforeseeable developments may arise in this field." Mindful of these contingen-

and Senators (Br. 3-4) make similar assertions. As we have explained (Pet. 21 n.14, 27-28; Br. 34 n.24), however, the dispute in this case is about the meaning of the statute, not whether the Secretary has the discretion to ignore it. We maintain that Section 2201(v) imposes a mandatory duty on the Secretary to restrict enrichment of foreign uranium when this is necessary to assure the viability of the domestic uranium industry, but it does not impose any duty on the Secretary to take actions that would not achieve its goal.

cies, the Committee drafted a bill that would "permit the Commission to survey periodically the condition of the domestic and world uranium markets and to offer or refuse to offer its enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium industry" (*id.* at 31). It would be most peculiar for a Committee so concerned about future uncertainties and the need for regulatory flexibility to turn around and enact into law its understanding of the then-contemporary condition of the domestic and world uranium markets. Moreover, there would be no point in enacting such a statute, when Congress could just as easily enact a statute that would impose restrictions only when this would fulfill the statutory purpose—the maintenance of a viable domestic uranium industry. Respondents never explain why Congress would deliberately choose to pass a statute that would become irrational over time, rather than one that is capable of adapting to changing circumstances.<sup>2</sup>

<sup>2</sup> Respondents' argument rests on the assumption that Congress did not foresee the day when enrichment restrictions would lose their effectiveness because of competition from other suppliers of enrichment services. Respondents' confident assertion (Br. 25 n.35) that Congress did not foresee the possible demise of DOE's monopoly in enrichment services, however, is unwarranted. In fact, as both respondents (Br. 27 n.37) and we (Gov't Br. 29 n.21) have noted, in the process of considering the Private Ownership Act, the Joint Committee on Atomic Energy questioned the General Counsel of the Atomic Energy Commission (AEC) on the effectiveness of enrichment restrictions in the face of potential foreign competition in the market for enrichment services from Great Britain. *Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 1st Sess. 30 (1963). In addition, at the 1964 hearings Chairman Seaborg, in response to questions from the Joint Committee, stated (*Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 2d Sess. 339-340) that other countries might begin selling enriched uranium to American users in the late 1970s.



Respondents' notion that statutes incorporate the factual assumptions that may have given rise to their enactment finds no support in this Court's cases. See, e.g., *Diamond v. Chakrabarty*, 447 U.S. 303 (1980); *Fortnightly Corp. v. United States*, 392 U.S. 390, 395-396 (1968); *Browder v. United States*, 312 U.S. 335, 339-340 (1941). In *Diamond*, for example, the Court held that a micro-organism was patentable, even though the Plant Patent Act of 1930 had been enacted on the assumption that living things were not patentable (447 U.S. at 310-311). The Court explained (*id.* at 312-313) that the 1930 Act did not embody the legal conclusion that organisms could not be patented; it merely reflected the belief—universal in 1930 but subsequently proven to be false—that a living organism could not be designed by man. The lesson of *Diamond*—that Congress will not be presumed to have bound itself to the exact conditions that prevailed when a law was enacted—applies even more strongly where, as here, a subject has been committed to an expert agency, which is charged with applying congressional policy to changing circumstances.

b. Respondents also reiterate the argument (Br. 20)—advanced for the first time in their brief in opposition (at 13)—that enrichment restrictions may in fact be necessary to assure viability in the sense that they may be a “necessary” as opposed to a “sufficient” condition of viability.

This appeal to technical notions of necessary and sufficient conditions is unavailing. First, it ignores the “fundamental canon of statutory construction \* \* \* that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Perrin v. United States*, 444 U.S. 37, 42 (1979), citing *Burns v. Alcala*, 420 U.S. 575, 580-581 (1975). The statute says that restrictions must be “necessary to assure” a viable domes-

tic industry, not that they must be a “necessary but not sufficient condition” of viability. Respondents' argument “would give an unwarranted rigidity to the application of the word ‘necessary,’ which has always been recognized as a word to be harmonized with its context.” *Armour & Co. v. Wantock*, 323 U.S. 126, 129-130 (1944), citing *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413, 414 (1819).

Moreover, under the theory elsewhere advanced by respondents (see Br. 26-29), enrichment restrictions are in fact not a “necessary condition” of viability. As respondents note (*ibid.*), the importation or the domestic transfer of either enriched or unenriched uranium require a license from the Nuclear Regulatory Commission (NRC) (see 42 U.S.C. 2073(a) (enriched uranium); 42 U.S.C. 2092 (unenriched uranium)). Respondents suggest that the NRC's licensing powers could be used to give the domestic uranium industry a complete monopoly in the primary domestic market for uranium and thus to promote the viability of the domestic uranium industry. But if that is true, then restrictions on *enrichment* of foreign uranium under Section 2201(v) would not be a necessary condition of viability, since any contribution such restrictions would make to viability could be made as well or better by other means. If the statute requires that this logic game be played, respondents cannot prevail.

2. In any event, there is no merit to the contention that Section 2201(v) either requires the NRC to impose an embargo on imports of enriched uranium, or requires DOE to impose enrichment restrictions if such restrictions, in combination with an NRC embargo, might make the domestic industry viable.<sup>3</sup> Section 2201(v) refers to one and

<sup>3</sup> It is entirely speculative whether granting the domestic uranium industry even a total monopoly in the primary domestic market would be enough to make the domestic uranium industry profitable; it is

only one tool to assure viability—enrichment restrictions. It requires that a specifically identified means—enrichment restrictions—be used to achieve a particular end—the viability of the domestic industry—and imposes no duty with respect to any other policy measure when the means cannot achieve the end. Possible actions of the NRC, and their possible effects on viability, thus have no bearing on DOE's obligations under Section 2201(v).

This conclusion has nothing to do with the 1974 division of the Atomic Energy Commission (AEC) into DOE and the NRC; contrary to respondents' suggestion (Br. 29), the same result would follow even if all the powers of DOE and the NRC were still centralized in one agency. The Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602 (the Private Ownership Act), authorized the AEC to sell enrichment services. That same Act also authorized the AEC to license imports of enriched

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even more uncertain whether this step would make it "viable" within the meaning of the statute and implementing criteria (see Gov't Br. 40-42). The domestic uranium industry was in serious decline well before uranium imports reached a significant level. See *Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports: Hearings Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 12, 16 (1981) (through August of 1981, 5% of ore delivered to DOE for enrichment was of foreign origin) (statement of Shelby Brewer, Assistant Secretary of Energy for Nuclear Energy). Indeed, that decline set in at a time when restrictions on DOE's enrichment of foreign ore had not yet been completely phased out. See 39 Fed. Reg. 38016-38017 (1974) (schedule of phase-out). Moreover, domestic uranium users have accumulated large stockpiles of enriched uranium, and a substantial secondary market has developed (51 Fed. Reg. 3625 (1986)). These factors suggest that the problems of the domestic industry are due to fundamental economic conditions—especially a serious imbalance of supply and demand—not to imports of uranium ore. See 51 Fed. Reg. 27135 (1986).

uranium.<sup>4</sup> The provision of enrichment services was made subject to the proviso at issue in this case. However, the Joint Committee on Atomic Energy specifically *declined* to require that the AEC exercise its licensing power so as to assure the maintenance of a viable domestic uranium industry. Such a proviso was originally included in the legislation proposed by the domestic uranium industry that became Section 2201(v), but was not recommended by the Joint Committee or adopted by Congress. See *Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 2d Sess. 198 (1964) (proposal by Kerr-McGee Co.). Clearly, had Congress wanted enrichment restrictions to be used in conjunction with import restrictions, it would have attached the proviso that appears in Section 2201(v) to the NRC's licensing authority. Congress's refusal to do so cannot be reconciled with respondents' argument.<sup>5</sup>

3. In our opening brief, we explained (at 34-37) that the court of appeals' reading of Section 2201(v) can draw no support from subsequent congressional consideration of enrichment restrictions and uranium import restric-

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<sup>4</sup> Under 42 U.S.C. 2077(c), the AEC (now the NRC) may not "issue a license pursuant to [42 U.S.C. 2073] to any person within the United States if the Commission finds that the . . . issuance of such license would be inimical to the common defense and security or would constitute an unreasonable risk to the health and safety of the public." Section 2077(c) makes no mention of the domestic uranium industry or any economic policy considerations.

<sup>5</sup> Moreover, as we have noted (page 5, *supra*), restrictions on the importation of both enriched and unenriched uranium could provide any relief that could be provided through enrichment restrictions alone. Had Congress wished the agencies to protect the domestic industry with all means and at all costs, as respondents seem to assume, it would have adopted Kerr-McGee's entire proposal.



tions. Indeed, in 1982, in enacting Section 170(b) of the Atomic Energy Act of 1954, 42 U.S.C. 2210(b), Congress specifically rejected relief similar to that sought by respondents.

In an effort to create the contrary impression, respondents suggest that legislators who supported strong measures to protect the domestic uranium industry in fact believed that Section 2201(v) requires DOE to impose enrichment restrictions whenever the domestic uranium industry is not viable (see, e.g., Resp. Br. 30 (quoting remarks of Rep. Lujan, one sponsor of the Conference Committee proposal that was rejected on the House floor)). Little can be learned about the meaning of a statute enacted in 1964, however, from beliefs expressed in 1982 by individual legislators whose proposals were mainly not adopted (see Gov't Br. 35-36 (rejection of both initial Senate bill and subsequent Conference Committee proposal)). By contrast, Congress's refusal (see *ibid.*) to pass measures that would automatically protect the domestic uranium industry from imports suggests that Congress as a whole understood that the domestic industry's problems stem from causes far more fundamental than foreign competition.

4. Respondents suggest (Br. 33-37) that DOE's interpretation of Section 2201(v) does not deserve the deference this Court ordinarily accords an agency's reading of its statute (see *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986)). Their arguments on this point are not persuasive.<sup>6</sup>

<sup>6</sup> Respondents also assert (Br. 36) that DOE's interpretation of Section 2201(v) deserves no deference because of a continuing resolution which states that "no provision of this joint resolution or the July 24,

a. Initially, respondents (Br. 5-7, 34) and amici (see, e.g., Senators Amici Br. 2-3) maintain that DOE's interpretation of Section 2201(v) should not receive deference because DOE has changed its position on the provision's meaning. But DOE's understanding of Section 2201(v) has not changed over time. What has changed are the facts, including the domestic industry's viability and the effects enrichment restrictions would have on its viability. Neither the AEC nor DOE has ever endorsed the court of appeals' interpretation of Section 2201(v), which would require that restrictions be imposed whenever the domestic industry is not viable, whatever might be the effects of restrictions on viability.

In fact, the statements on which respondents rely all reflect the understanding that Section 2201(v) applies only when there is a causal connection between uranium imports or DOE's enrichment of uranium imports and the viability of the domestic uranium industry. For example, in 1974, in explaining the AEC's decision to phase out its enrichment restrictions, Commissioner Anders (see Resp. Br. 6 (footnote omitted)) stated that "[s]hould there be any indication that the proposed schedule [permitting increased enrichment of foreign uranium] is endangering domestic industry viability, U.S. self-sufficiency, or our national

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1986, criteria [in which DOE declined to adopt enrichment restrictions and explained its rationale for doing so] shall affect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities \* \* \*." Act of Oct. 18, 1986, Pub. L. No. 99-500, § 305, 100 Stat. 1783-210. As we have explained (Reply Memo. 5-6; Br. 15 n.12), we do not argue that the rulemaking affects the merits of this case. We have referred to the rulemaking because it sets out the Secretary's views on the legal and factual questions relevant here.



security, the [AEC] will reimpose restrictions or take such other steps as might be appropriate." *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use: Hearings Before the Joint Committee on Atomic Energy*, 93d Cong., 2d Sess. 6 (1974) [hereinafter *1974 Hearings*]. In other words, Commissioner Anders recognized that if DOE's enrichment activities led to an increased use of foreign uranium that threatened the domestic industry, restrictions would be reimposed. He did not suggest that restrictions would automatically be reimposed if the domestic industry became non-viable for reasons unrelated to imports, or because of imports of uranium that would not be affected by enrichment restrictions.

At the same hearings, George Quinn, the AEC's Assistant General Manager for Production and Management of Nuclear Materials, explained (*1974 Hearings* 135 (emphasis added)) that during and after the phase-out the Commission would "monitor the extent of importation of foreign uranium for domestic use and *its effect on the viability of the domestic uranium producing industry*"; he likewise stated (*id.* at 134 (emphasis added)) that the Commission would be ready "to take any appropriate action if it appears [to be] *necessary to preserve the viability of the [domestic] industry*." Again, these statements make it plain that Section 2201(v) mandates an inquiry into the causes and possible cures of the domestic industry's problems, not the unthinking imposition of restrictions without regard to their effects.

Similarly, when the then-Assistant Secretary of Energy for Nuclear Energy testified in 1981 that the difficulties of the domestic uranium industry did not call for a reconsideration of the phase-out of enrichment restrictions, he explained that lack of demand, not imported uranium,

was the cause of the domestic industry's depressed state. See *Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports: Hearings Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 13 (1981) (statement of Shelby Brewer, Assistant Secretary of Energy for Nuclear Energy).<sup>7</sup> Like Commissioner Anders and Mr. Quinn, Assistant Secretary Brewer emphasized (*ibid.*) the importance of analyzing the effects of restrictions on viability.

In short, none of the statements cited by respondents ignored the need for a causal connection between enrichment restrictions and viability, or suggested that restrictions should be imposed even if they would not assure a viable domestic industry. These statements in no way support the court of appeals' reading of Section 2201(v).

b. Respondents also seek to distinguish this case from *Young* by arguing (Br. 34) that in *Young* the FDA had two methods of achieving the statutory purpose, while in this case Congress has prescribed only one way of achieving the statute's stated goal.

This attempted distinction is without substance. First, *Young* made it clear that the legal question involved was the deference to be paid to an agency's interpretation of an ambiguous statute (see 476 U.S. at 981 ("[t]he FDA has therefore advanced an interpretation of an ambiguous statutory provision")). Significantly, respondents have conceded (Br. 34) that in Section 2201(v) the phrase "to the extent necessary" modifies the phrase "shall not offer such [enrichment] services." Accordingly, the syntactical ambiguity identified in *Young* is not even present in this case:

<sup>7</sup> Respondents' insinuation (see Br. 8) that the "economic disaster" in the domestic industry resulted from DOE's failure to re-impose restrictions under Section 2201(v) is thus without foundation.

it is undisputed that the critical phrase "to the extent necessary to assure the maintenance of a viable domestic uranium industry" qualifies DOE's mandatory duty to restrict enrichment services.

Faced with the clear holding of *Young*—that agency readings of ambiguous texts deserve deference—respondents (see Br. 33-34) simply attempt to distinguish this case on its facts. But there is nothing in the Court's opinion in *Young* to suggest that it applies to cases in which the interpretive question involves two ways to reach the statutory goal, but not to cases in which the goal cannot be achieved. *Young* stands for the principle that reasonable agency interpretations should receive deference. As we have explained, DOE's interpretation of Section 2201(v) is an eminently reasonable explication of both the text of the provision—which refers to the goal of viability—and of its underlying rationale. To read *Young* as giving deference to reasonable agency interpretations only if they happen to fulfill the statutory purpose in particular ways is to narrow that case's holding to its facts.<sup>8</sup>

<sup>8</sup> Respondents have not addressed any arguments concerning the General Agreement on Tariffs and Trade (GATT), Jan. 3, 1947, pts. 5, 6, 61 Stat. A3, T.I.A.S. No. 1700, asserting (Br. 37 n.44) that the GATT issue was not fairly presented in the petition. Certain amici, however, have discussed GATT in considerable detail (see Gov't of Australia Br.; Gov't of Canada Br.).

This case involves the meaning of 42 U.S.C. 2201(v), and does not call for an adjudication of the United States' obligations under GATT. This does not mean, however, that it would be improper for the Court to consider the role of trade policy in ascertaining the congressional intent underlying Section 2201(v). As amici have noted (see, e.g., Gov't of Canada Br. 11-13), Congress, when it adopted the Private Ownership Act, was concerned with the effects of enrichment restrictions on United States international trade relations (see *Private Ownership Act Report* 17 (Section 2201(v) not inconsistent with GATT)). It might be appropriate to infer therefore that Congress would have been reluctant to require enrichment restrictions that

For these reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.  
Respectfully submitted.

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APRIL 1988

would not make the domestic industry viable, thereby incurring the cost of offense to our trading partners without any benefit to the national interest. Similarly, it might be reasonable to infer that Congress resisted the suggestion that the AEC be required to restrict imports of enriched uranium in order to assure domestic viability (see page 7, *supra*) at least in part in order to minimize disruptions of our trade relations. Any such argument concerning the meaning of Section 2201(v) would, we believe, be properly encompassed within the question raised in the petition.

- The Solicitor General is disqualified in this case.

No. 87-645

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

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F. CLARK HUFFMAN, *et al.*,  
*Petitioners,*

v.

WESTERN NUCLEAR, INC., *et al.*,  
*Respondents.*

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On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

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**BRIEF OF ELECTRIC UTILITY COMPANIES AS  
AMICI CURIAE IN SUPPORT OF PETITIONERS**

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**On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit**

**BRIEF OF ELECTRIC UTILITY COMPANIES AS  
AMICI CURIAE IN SUPPORT OF PETITIONERS**

In accordance with this Court's Rule 36, the domestic electric utility companies listed below<sup>1</sup> (the "Utilities")

<sup>1</sup> The Utilities include:

Alabama Power Company  
Arkansas Power and Light Company  
Baltimore Gas and Electric Company  
Cleveland Electric Illuminating Company  
Connecticut Light and Power Company  
Duke Power Company  
Georgia Power Company  
Iowa Electric Light and Power Company  
Kansas City Power and Light Company  
Kansas Electric Power Cooperative, Incorporated  
Kansas Gas and Electric Company  
Louisiana Power and Light Company  
MSU System Services, Incorporated

[Continued]

have received the written consent of the parties to file this brief as *amici curiae* in support of the position of petitioners F. Clark Huffman, *et al.* Copies of the letters of consent have been filed with the Clerk.

### INTRODUCTION

In this case, the Court is called upon to decide whether the Department of Energy ("DOE" or the "Department") correctly interpreted its responsibilities under section 161v of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v) (1982) ("section 2201(v)"). At issue is the meaning of the second proviso of section 2201(v), which states that DOE:

*to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer [uranium enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.*

(Emphasis added.) On September 26, 1985, the Secretary of DOE issued a determination that the domestic uranium industry was not viable in calendar year 1984. Memorandum for The President from DOE Secretary John S. Herrington (Sept. 26, 1985) ("Herrington

<sup>1</sup> [Continued]

Ohio Edison Company  
 Pennsylvania Power and Light Company  
 Power Authority of the State of New York  
 Public Service Electric and Gas Company  
 Southern California Edison Company  
 System Energy Resources, Incorporated  
 Texas Utilities Electric Company  
 The Toledo Edison Company  
 Union Electric Company  
 Virginia Electric and Power Company  
 Western Massachusetts Electric Company  
 Wisconsin Electric Power Company  
 Wolf Creek Nuclear Operating Corporation

Memo."). Nevertheless, DOE did not impose enrichment restrictions on foreign-origin uranium under section 2201(v), because it concluded that such restrictions would not assure the viability of the domestic industry, and, in that circumstance, enrichment restrictions were not required by statute. *Id.*; see also 51 Fed. Reg. 3624, 3627 (1986).

Enacted in 1964 as section 16 of the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602 (1964) ("Private Ownership Act"), section 2201(v) generally authorized DOE to enter into contracts to enrich privately-owned uranium. It required DOE to establish written criteria setting forth the terms and conditions under which its enrichment services would be offered—including the extent to which such services would be made available for foreign uranium intended for use in the United States—and it made the criteria subject to prior Congressional review.

Congress did not disapprove the criteria proposed in 1973 by DOE's predecessor, the Atomic Energy Commission, to phase out by 1984 all restrictions on the enrichment of foreign uranium intended for use in this country. See 39 Fed. Reg. 38,016, 38,017 (1974) (modification of restrictions on enrichment); 38 Fed. Reg. 32,595, 32,596 (1973) (notice of proposed modification). Similarly, in 1983, as an alternative to proposed legislation requiring DOE to reimpose enrichment restrictions on foreign uranium in certain circumstances, see H.R. Rep. No. 884, 97th Cong., 2d Sess. 17, 52 (1982), Congress enacted section 170B of the Atomic Energy Act, 42 U.S.C. § 2210b (1982) ("section 2210b"). Section 2210b requires DOE to issue an annual report for the years 1983 to 1992 on the viability of the domestic uranium industry and, depending upon the Department's findings, to request the initiation of specific U.S. international trade law investigations with respect to uranium im-

ports. See 19 U.S.C. §§ 1862, 2251 (1982 & Supp. IV 1986) (investigations authorized).

In its first annual report, issued in December 1984, DOE determined that the domestic uranium industry had been viable in 1983. Letter from DOE Secretary Donald Paul Hodel to George Bush, President of the Senate (Dec. 31, 1984) ("Hodel Letter"); Energy Information Adm., DOE, Domestic Uranium Mining and Milling Industry: 1983 Viability Assessment (1984). Also in December 1984, the respondent domestic uranium mining and milling companies initiated this lawsuit. Respondents alleged, among other things, that DOE's failure to impose enrichment restrictions on foreign uranium was unlawful, and they sought an order compelling the Department to begin a rulemaking to determine the appropriate level of enrichment restrictions. Petition For Certiorari at 13. Subsequently, respondents asked the district court for an order imposing judicially-mandated restriction levels. *Id.*

In September 1985, the Secretary of DOE issued his determination that the uranium industry had not been viable in 1984 but that enrichment restrictions would not help the industry. Herrington Memo. At the same time, he requested the assistance of the United States Trade Representative in assessing whether the Department's findings of fact about the domestic industry would provide the basis for successful investigations under the U.S. trade laws. Letter from DOE Secretary John S. Herrington to U.S. Trade Representative Clayton Yeutter (Sept. 26, 1985) ("Letter to Yeutter"). In December 1985, the Trade Representative advised the Secretary that successful trade investigations could not be brought and, further, that any import relief "would not be sufficient to make the domestic industry viable[.]" Letter from U.S. Trade Representative Clayton Yeutter to DOE Secretary John S. Herrington (Dec. 26, 1985) ("Yeutter Response").

In January 1986, DOE began a rulemaking to revise its enrichment criteria in response to market changes and the depressed condition of the domestic industry. 51 Fed. Reg. at 3625 (notice of proposed rulemaking). Throughout the course of the rulemaking, however, the Department reiterated its prior conclusion that to reimpose restrictions on the enrichment of foreign uranium "could further damage the U.S. mining industry," *id.* at 3627, and thus would be "counterproductive." 51 Fed. Reg. 15,632 (1986) (notice of additional comment period).

Nevertheless, respondents insist that section 2201(v) requires DOE to impose restrictions automatically upon a finding that the domestic industry is not viable. The district court below agreed, and issued an injunction that would require DOE as of January 1, 1987 to refuse to enrich any foreign uranium for domestic use. Petition For Certiorari at 23a. On appeal, the Tenth Circuit upheld the district court's injunction. *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430, 1440 (10th Cir. 1987), *cert. granted*, — U.S. —, 108 S. Ct. 692 (1988).

#### INTEREST OF THE *AMICI CURIAE* ELECTRIC UTILITY COMPANIES

The Utilities filing this brief as *amici curiae* will be vitally affected by the injunction. Each of the Utilities is licensed by the Nuclear Regulatory Commission to construct, own, or operate one or more nuclear reactors. In order to operate their nuclear reactors, the Utilities depend on sufficient, timely, and economical supplies of enriched uranium. Each of the Utilities currently has one or more contracts or options to supply DOE with natural uranium for the Department to enrich into usable reactor fuel. These contracts with DOE contain no restrictions on enrichment of foreign-origin uranium, and the Utilities have relied on them to purchase, or contract for the purchase of, significant quantities of uranium from abroad. As of January 1, 1985, U.S. utility com-



panies were estimated to hold contracts or options for natural uranium from foreign sources in 1985-1990 totaling 30.6 million pounds of  $U_3O_8$ —with a value of approximately \$780 million dollars. See Affidavit of Loring E. Mills ¶ 3, *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430 (10th Cir. 1987) (No. 86-1942), cert. granted, — U.S. —, 108 S. Ct. 692 (1988) (“Mills Aff.”), reprinted as Appendix A to the Utilities’ Brief In Support Of Petition For Certiorari; Petition For Certiorari at 24 n.18.

As Congress recognized in enacting section 2201(v), “it is essential that utility companies and the atomic energy industry be able to plan on a long-term basis in the context of normal economic conditions. This is especially true with respect to commitments for fuel.” S. Rep. No. 1325, 88th Cong., 2d Sess., reprinted in 1964 U.S. Code Cong. & Admin. News 3105, 3113. The Utilities’ need for stable, long-term fuel supply and enrichment contracts is as great today as it was in 1964. Yet unless this Court reverses the decision below, the injunction will abruptly frustrate the Utilities’ fuel supply and enrichment expectations.

Under the injunction, the Utilities will be unable to have the uranium they purchased or contracted to purchase abroad enriched pursuant to their contracts with DOE. The Utilities’ obligations to provide their customers with a reliable supply of electricity at a reasonable cost, however, will require them to take all necessary steps to obtain sufficient, economical supplies of enriched uranium to support continued operation of their nuclear plants. Mills Aff. ¶ 6. Utilities with foreign uranium under contract may be forced to shift their demand for enrichment services overseas and away from DOE.<sup>2</sup> The increased demand will drive up the price of

<sup>2</sup> See Declaration of Sherry E. Peske ¶¶ 8-11, Appellants’ App. To Motion For Stay 80, 83-85, *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430 (10th Cir. 1987) (No. 86-1942), cert. granted, — U.S. —, 108 S. Ct. 692 (1988) (“Peske Decl.”).

foreign enrichment services. Moreover, as fewer utility companies bring uranium to DOE for enrichment, DOE will have to raise the price of enrichment services to its remaining customers in order to comply with its statutory requirement to recover its costs. *Id.* ¶ 6(a); see 42 U.S.C. § 2201(v). Utilities with foreign uranium already on hand may attempt to purchase stockpiled domestic uranium from other domestic utility companies to enrich under their contracts with DOE. Such uranium will be hard to obtain as the other companies hoard their own supplies for the future, and it will command a premium when it is available. Mills Aff. ¶ 6(b). Finally, some utility companies may seek to purchase current production from domestic uranium suppliers. If none of the other alternatives are feasible and all of the domestic utility companies must obtain their uranium requirements in this country, the domestic uranium industry will be unable to produce economically the amount of uranium required. In fact, domestic producers are already importing foreign uranium for resale to U.S. utilities, because it is more profitable for them than mining and milling additional quantities from their own domestic resources. See 51 Fed. Reg. 27,132, 27,135 (1986). The mining industry will certainly raise the price of any additional uranium it does produce in order to cover its higher marginal costs—and to take advantage of the surge in demand created by the injunction. See Mills Aff. ¶ 6(c).

Thus, it is inevitable that the Utilities, pursuing any of the options available to them if the injunction takes effect, will end up with “duplicative, overlapping, or conflicting contracts for uranium supplies or enrichment services or both.” *Id.* ¶ 10. Lengthy and expensive litigation over a host of contractual issues is sure to follow. See *id.* “Under traditional principles of electricity rate regulation, the increased uranium costs, the increased prices for enrichment services, and the costs of abrogating existing contracts will all be incorporated in electric-

rates and ultimately would be borne by the consumers of electricity." *Id.* ¶ 12.

These increased costs to the Utilities and their customers throughout the country are wholly unnecessary. Moreover, there is no assurance whatsoever that the injunction will result in increased domestic production of uranium. It is far more likely that there will be no significant change in domestic production. Rather, DOE will lose enrichment sales to its overseas competitors, and domestic utility companies will increase their reliance on foreign enrichment services and maintain or increase their reliance on foreign uranium. The nonviability of the domestic uranium industry is not attributable to uranium imports, but to the unanticipated decline in the demand for nuclear power, the cancellation of power plants, the failure of domestic mining and milling companies to decrease uranium production in response to the decrease in consumption, the build-up of utility inventories of natural and enriched uranium, and the emergence of secondary and foreign markets for both natural and enriched uranium. *See Peske Decl.* ¶ 4. An injunction barring DOE enrichment of foreign uranium therefore would not redress the injuries alleged by respondents.

#### SUMMARY OF ARGUMENT

The court below construed section 2201(v) to require DOE to ignore its own findings about the state of the domestic uranium industry. The court ordered DOE not to enrich foreign uranium because DOE had concluded that the domestic industry is not viable, even though the Department also found that enrichment restrictions would not "assure the maintenance of" a viable domestic industry. *See Western Nuclear, Inc. v. Huffman*, 825 F.2d at 1440. The holding of the court below should be reversed because the plain meaning of section 2201(v) grants DOE the discretion to determine whether enrichment restrictions are "necessary to assure the maintenance of" a viable domestic industry (emphasis added), and because the Department's decision not to impose such restrictions was a reasonable administrative interpretation to which a reviewing court should defer.

Section 2201 contains 24 subsections setting forth numerous duties of DOE and the Nuclear Regulatory Commission. 42 U.S.C. § 2201 (1982). Where Congress wanted to require a specific action to follow a particular agency finding, it did so—but not in section 2201(v). *See id.* § 2201(q). Where Congress wanted to scrutinize DOE's judgment about enriching or not enriching foreign uranium, it did so—in the third proviso of section 2201(v), which requires the Department to submit its proposed enrichment criteria to Congress for a 45-day review. In the second proviso of section 2201(v)—the actual words at issue in this litigation—Congress simply instructed DOE to restrict enrichment services for foreign uranium intended for use in the United States "to the extent necessary" to assure the maintenance of a viable domestic uranium industry. That language is the same language used elsewhere in section 2201 to signify that a specific action has been left to the agency's discretion. Thus, the plain meaning of the second proviso of section 2201(v) is that DOE shall restrict enrichment services for foreign uranium to the extent that DOE, exercising the discretion clearly granted by the statute, deems such restrictions necessary to assure the domestic industry's viability. If DOE determines that the domestic industry cannot be made viable by enrichment restrictions, the Department is authorized under section 2201(v) not to impose them.

Section 2201(v) was added to the Atomic Energy Act in 1964, along with other provisions, to establish more market-oriented economic conditions for an atomic energy industry converting to peacetime applications. Virtually the only commercial application Congress contemplated was the use of nuclear power to generate elec-

tricity.



tricity, and the legislative history of the Private Ownership Act recognized the need of electric utility companies to rely on long-term fuel supply contracts. See S. Rep. No. 1325 at 3113. Despite its concern for the viability of the domestic uranium industry, in section 2201(v) Congress made DOE's duty to impose enrichment restrictions on foreign uranium "flexible both as to the duration and degree," *id.* at 3135, leaving DOE free to impose no degree of restrictions if it found they would not assure the industry's viability. Further, Congress expressly rejected a proposal in 1982 requiring DOE to reimpose enrichment restrictions automatically when uranium imports exceeded a specified percentage of domestic requirements. See 128 Cong. Rec. H8802-8809 (daily ed. Dec. 2, 1982).

In deciding not to impose enrichment restrictions under section 2201(v), DOE properly balanced its finding that restrictions would not return the uranium industry to viability with the costs such restrictions would have for other sectors of the atomic energy industry, including the nation's electric utilities and their customers. Its decision is entitled to deference under the principles this Court articulated in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Even if the court below was correct in ruling that DOE misinterpreted its responsibilities under the statute, however, the court's remedy—an injunction immediately and indefinitely suspending all enrichment services for foreign uranium—ousts the Department of its primary jurisdiction over the promulgation of enrichment criteria and deprives Congress of its role in scrutinizing the criteria. As such, the injunction undermines the division of power inherent in the Constitution and the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1982).

## ARGUMENT

### I. DOE'S AUTHORITY TO RESTRICT ENRICHMENT OF FOREIGN URANIUM IS DISCRETIONARY UNDER THE PLAIN MEANING OF SECTION 2201(v).

#### A. The Discretionary Language Used In Section 2201(v) Is Consistent With The Language Used Throughout Section 2201.

Section 2201 sets forth the general duties of the Atomic Energy Commission (now divided between the Nuclear Regulatory Commission and the DOE). Some of the duties are set forth broadly, and the Commission is left free to discharge them without further statutory restrictions. For example, the Commission is authorized to establish "such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material *as [it] may deem necessary or desirable* to promote the common defense and security or to protect health or to minimize danger to life or property." *Id.* § 2201(b) (emphasis added). Similarly, the Commission is authorized to "prescribe such regulations or orders *as it may deem necessary*" to guard against the loss or diversion of certain special nuclear materials or to prevent "any use or disposition thereof *which the Commission may determine* to be inimical to the common defense and security[.]" *Id.* § 2201(i) (emphasis added).

Other duties set forth in section 2201 are made subject to requirements or provisos that the Commission abide by certain standards, guidelines, or criteria. Thus, the Commission is authorized to enter into contracts for the purchase or acquisition of supplies, equipment, materials, or services whenever it determines that to do so is justified by certain guiding cost/benefit principles enumerated in the statute. *Id.* § 2201(u)(2)(A),(B). Likewise, the Commission is authorized to enter into various production-related activities with specified li-



censees and to make certain nuclear materials available, in some cases for sale, to such licensees, provided that it "shall establish prices to be paid by licensees for material or services to be furnished by the Commission pursuant to this subsection, which prices shall be established on such a nondiscriminatory basis as, *in the opinion of the Commission*, will provide reasonable compensation to the Government for such material or services and will not discourage the development of sources of supply independent of the Commission." *Id.* § 2201(m) (emphasis added). These and similar requirements, however, do not dictate the precise content or outcome of the Commission's acts. *See also id.* § 2201(d) (authority to set salary rates); § 2201(e) (authority to grant permits to operate commercial businesses at project sites). That is still left to the Commission to decide.

Only a few of the duties set forth in section 2201 are subject to requirements or provisos that mandate the precise content or outcome of the Commission's acts, and these are narrowly drawn. Section 2201(s) authorizes the Commission to establish a plan for a succession of authority to assure the continuity of operations in the event of a national disaster due to enemy activity, "*Provided*, That any such succession to authority, and vesting of authority shall be effective only in the event and as long as a quorum of three or more members of the Commission is unable to convene and exercise direction during the disaster period[.]" *Id.* § 2201(s). Section 2201(q) authorizes the Commission to grant certain rights-of-way over land under its jurisdiction and control, "*Provided*, That such rights-of-way shall be granted only upon a finding by the Commission that the same will not be incompatible with the public interest[.]" *Id.* § 2201(q).

It was to this statutory framework that section 2201(v) was added in 1964 by the Private Ownership Act. Section 2201(v) authorizes DOE to enter into cer-

tain contracts for the production or enrichment of special nuclear material, subject to two provisos, of which the second is at issue in this litigation. Further, section 2201(v) directs DOE to establish criteria setting forth the terms and conditions under which such production and enrichment services generally shall be made available, and that authorization is subject to a third proviso. In full, section 2201(v) authorizes DOE, in the performance of its functions, to:

(A) enter into contracts with persons licensed under sections 2073, 2093, 2133 or 2134 of this title for such periods of time as the [Department] may deem necessary or desirable to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the [Department]; and

(B) enter into contracts to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the [Department] in accordance with and within the period of an agreement for cooperation arranged pursuant to section 2153 of this title while comparable services are made available pursuant to paragraph (A) of this subsection:

*Provided*, That (i) prices for services under paragraph (A) of this subsection shall be established on a nondiscriminatory basis; (ii) prices for services under paragraph (B) of this subsection shall be no less than prices under paragraph (A) of this subsection; and (iii) any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time: *And provided further*, That the [Department], to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The [Department] shall establish criteria in

writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States: *Provided*, That before the [Department] establishes such criteria, the proposed criteria shall be submitted to the Joint Committee, and a period of forty-five days shall elapse while Congress is in session (in computing the forty-five days there shall be excluded the days in which either House is not in session because of adjournment for more than three days) unless the Joint Committee by resolution in writing waives the conditions of, or all or any portion of, such forty-five day period.

DOE's primary responsibility under section 2201(v), to enter into production or enrichment contracts, is set forth initially with language of broad authorization: the Department may enter into such contracts "for such periods of time as [it] may deem necessary or desirable" to provide for such services. Under the first proviso of section 2201(v), however, DOE must comply with several standards. It must establish prices on a nondiscriminatory basis. It may not establish prices for the services under paragraph (B) (production or enrichment services under international arrangements) which are less than the prices established for services under paragraph (A) (production or enrichment services for domestic licensees). It must establish prices on a basis to recover the government's costs over a reasonable period of time.

Then comes the second proviso: "That the [Department], *to the extent necessary to assure the maintenance of a viable domestic uranium industry*, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility

within or under the jurisdiction of the United States." (Emphasis added.) The key language in this proviso—"to the extent necessary"—is the same language used throughout section 2201 (including the opening clause of section 2201(v)) to signify that a matter has been left by the statute to the Department's discretion. *See, e.g., id.* § 2201(b), 2201(i); *see also id.* § 2201(q) ("*Provided further*, That such rights-of-way shall not include any more land than is reasonably necessary for the purpose for which granted"). Congress used very different language elsewhere in section 2201 when it wanted to dictate, either generally or upon the occurrence of a particular contingency, the exact content or outcome of DOE's acts. *See id.* § 2201(q), 2201(s). The second proviso in section 2201(v) does not contain such language. It does not even contain language closely circumscribing DOE's discretion in the manner of the first proviso in section 2201(v).

**B. The Language Used In Section 2201(v) Plainly Authorizes DOE Not To Impose Enrichment Restrictions That Would Not, In DOE's Opinion, Assure Or Maintain A Viable Domestic Uranium Industry.**

The plain meaning of section 2201(v) is that DOE shall not offer enrichment services for foreign uranium intended for use in this country to the extent that DOE, exercising the discretion clearly granted it by the statute, deems enrichment restrictions necessary to assure the maintenance of a viable domestic uranium industry. To the extent that DOE determines that the domestic industry cannot be made viable by enrichment restrictions, the Department is authorized under section 2201(v) not to impose them. If Congress wanted to trigger enrichment restrictions automatically upon a finding by DOE that the domestic uranium industry is not viable, it would have used language to indicate that intention—as it did in section 2201(q), where the statute expressly provides that rights-of-way "shall be



granted *only upon a finding* by the [Department] that the same will not be incompatible with the public interest[.]” *Id.* § 2201(q) (emphasis added). Moreover, where Congress wanted to oversee DOE’s judgment about the advisability of making enrichment services available for foreign uranium, it did so plainly—in the third proviso of section 2201(v). There, Congress required DOE to submit its proposed enrichment criteria for a 45-day review, during which period Congress could disapprove them. The second proviso of section 2201(v), however, simply authorizes DOE to decide whether enrichment restrictions are “necessary to assure the maintenance of a viable domestic uranium industry.” That is, Congress left the imposition of restrictions to DOE’s discretion.

This Court recently construed similar statutory language in *Young v. Community Nutrition Institute*, — U.S. —, 106 S. Ct. 2360 (1986). In that case, the statute in question provided that when certain poisonous or deleterious food additives are required or unavoidably present, “the Secretary [of Health and Human Services] shall promulgate regulations limiting the quantity therein or thereon *to such extent as he finds necessary* for the protection of public health . . . .” *Id.* at 2362, quoting 21 U.S.C. § 346 (1982) (emphasis added). The Court found that this language was ambiguous because its syntax did not clearly indicate whether “to such extent” modified “shall” or “the quantity therein or thereon.”

A Congress more precise or more prescient than the one that enacted § 346 might, if it wished petitioner’s position to prevail, have placed “to such extent as he finds necessary for the protection of public health” as an appositive phrase immediately after “shall” rather than as a free-floating phrase after “the quantity therein or thereon.”

106 S. Ct. at 2364. Nevertheless, the Court upheld, as a reasonable construction of the statute, the interpretation

of the petitioner, the Commissioner of the Food and Drug Administration, that whether regulations are necessary to protect the public health is a determination to be made by the FDA. *Id.* at 2365.

In contrast to the statutory provision construed in *Young*, there is no ambiguity in the second proviso of section 2201(v). DOE is directed to limit its enrichment of foreign-origin uranium “to the extent necessary to assure the maintenance of a viable domestic uranium industry.” By its location, the adverbial phrase “to the extent necessary” clearly modifies the action contained in the verb phrase “shall not offer.” Moreover, as this Court recognized in *Young*, the words “to such extent” may encompass “to no extent,” if the agency charged with applying the statutory language so determines. See *id.* at 2364-2366. The words used in section 2201(v), “to the extent,” clearly permit DOE to interpret them in the same way. In short, the terminology and the phrasing of section 2201(v)—as well as its relationship to the rest of the statutory section of which it was made part—all suggest that section 2201(v) authorizes DOE not to impose enrichment restrictions where it concludes that they would not assure or maintain the viability of the domestic industry. Accordingly, “if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.” *INS v. Cardoza-Fonseca*, — U.S. —, 107 S. Ct. 1207, 1224 (1987) (Scalia, J., concurring) (citations omitted); see also *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (literal meaning should be followed unless it “would lead to absurd results . . . or would thwart the obvious purpose of the statute”).

The interpretation given to section 2201(v) by the courts below would require DOE to impose enrichment restrictions automatically upon a finding that the domestic industry is not viable and to keep them in place indefinitely until the industry becomes viable. See *West-*



*ern Nuclear, Inc. v. Huffman*, 825 F.2d at 1440. The language of the statute, however, only requires DOE to consider whether enrichment restrictions are necessary "to assure the maintenance of" a viable industry. If, as DOE has concluded, *see* 51 Fed. Reg. at 27,135, the domestic industry is not viable and enrichment restrictions would not revive it, then a viable industry cannot be "maintained" by any action the Department might take.<sup>3</sup>

Further, as petitioners have illustrated, the courts below have construed section 2201(v) to require the imposition of enrichment restrictions without any logical or practical limitation:

If, for example, the Secretary had found that the domestic uranium industry was not viable because all American uranium reserves had been exhausted, the interpretation adopted by the court of appeals would nevertheless require DOE to cease all enrichment of foreign uranium. But if there were no domestic uranium to enrich, and DOE was barred from enriching foreign uranium, the DOE would have no choice but to close its doors. Presumably, the fuel needs of American nuclear power plants would then have to be satisfied by importing foreign uranium enriched elsewhere—in Europe or the So-

<sup>3</sup> Respondents allege that DOE should have imposed enrichment restrictions beginning in 1981 in order to maintain the viability of the domestic uranium industry. Brief In Opp. at 4-5, 14-15. DOE's policy concerning enrichment restrictions prior to its finding in September 1985 that the domestic industry was no longer viable is not at issue here. By the time respondents initiated this lawsuit, the Department's existing criteria had already phased out all restrictions on DOE enrichment of foreign uranium as of January 1, 1984. *See* 39 Fed. Reg. at 38,017. Moreover, DOE had announced its intention to phase out all restrictions during its rulemaking in 1974. *See id.* Respondents failed to seek judicial review of the criteria when they were adopted. They may not do so now collaterally by seeking an injunction to prevent the enrichment of foreign uranium. *See Baylor University Medical Center v. Heckler*, 758 F.2d 1052, 1058 (5th Cir. 1985); *Independent Bankers Association v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980); *Nader v. NRC*, 513 F.2d 1045, 1054-55 (D.C. Cir. 1975).

viet Union—while DOE's enrichment facilities stood idle.

Petition For Certiorari at 19 (emphasis in original). Respondents criticize this hypothetical "because Congress never contemplated such a fanciful situation, and would surely enact 'appropriate legislation' if domestic reserves were in fact ever exhausted." Brief In Opp. at 13 n.17, citing 42 U.S.C. § 2013(f) (1982). Nevertheless, "[j]udges interpret laws rather than reconstruct legislators' intentions." *INS v. Cardoza-Fonseca*, 107 S. Ct. at 1224 (Scalia, J., concurring). "Where the language of those laws is clear"—as it is in the case of section 2201(v)—the courts "are not free to replace it with an unenacted legislative intent." *Id.*

## II. DOE'S INTERPRETATION OF ITS AUTHORITY UNDER SECTION 2201(v) IS REASONABLE AND IS ENTITLED TO DEFERENCE.

### A. DOE's Interpretation Of Its Authority Is Supported By The Legislative History Of Section 2201(v) And By Congress's Subsequent Decision Not To Alter The Enrichment Restriction Guidelines Of Section 2201(v).

The discretionary nature of DOE's responsibilities under section 2201(v) is supported by the legislative history of the Private Ownership Act. In that Act, Congress sought to bring the atomic energy industry into the post-war era in which the predominant uses of nuclear power would be civilian, not military ones. S. Rep. No. 1325 at 3109-3115. In order to create a "more normal commercial market for natural uranium," the Act terminated the government's monopoly on the ownership of special nuclear material and, with it, the domestic uranium mining and milling industry's exclusive reliance on the government for its market. *Id.* Section 2201(v), added by section 16 of the Act, granted private parties access to enrichment facilities so that the uranium in-

dustry could deal directly with its ultimate customer, the utility industry. *Id.* at 3114. Further, section 2201(v) provided that, subject to Congressional approval, enrichment services would be made available for foreign uranium intended for use in the United States. *Id.* at 3120. Congress recognized, however, that by thus exposing the atomic energy industry to the play of private market forces, "this bill might have adverse effects on segments of the nuclear industry," and it sought to ameliorate such effects whenever possible. *Id.* at 3115.

Despite the acknowledged importance of a viable domestic uranium industry to the United States, Congress left the decision whether, in particular situations, to impose enrichment restrictions on foreign uranium intended for use in this country up to DOE:

the language of the bill will permit the [Department] to survey periodically the condition of the domestic and world uranium markets and to offer or refuse to offer its enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium industry.

*Id.* at 3135 (emphasis added). The Department's discretion was made "flexible both as to the duration and degree of the restriction." *Id.* Consistent with this delegation of authority, therefore, DOE could elect to impose no degree of enrichment restrictions if, in its opinion, restrictions were not "necessary to assure the maintenance of a viable domestic uranium industry." *Id.* at 3134; see also *id.* at 3120 (same).

As in the text of section 2201(v) itself, the legislative history clearly distinguishes between the imposition of enrichment restrictions, which is discretionary, and the submission to Congress of DOE's proposed enrichment criteria (and proposed revisions and amendments to criteria previously approved), which is mandatory. See *id.* at 3135-3136. Congress recognized that it could not, in

1964, "predict, with any degree of certainty, the condition of the domestic uranium industry a decade hence[.]" *id.* at 3135, much less two-and-a-half decades. Accordingly, Congress chose not to substitute, *a priori*, its judgment for the Department's as to whether, and when, enrichment restrictions would be necessary to assure the maintenance of a viable domestic uranium industry.

In arriving at this balance between the discretionary and the mandatory, Congress noted that it had rejected the idea of placing "an embargo or other statutory restriction on the importation of foreign uranium[.]" *Id.* at 3121.<sup>4</sup> Congress rejected a similar proposal in 1982 when, in enacting section 2210b, it linked DOE's findings on the domestic uranium industry's viability to the initiation of import-related investigations under U.S. trade law. During the previous year Congress had held hearings on the subject of DOE's enrichment policies. See *Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports: Hearing before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. (1981). In response, the Senate proposed to limit imports of both natural and enriched uranium to no more than 20 percent of domestic fuel needs. See 128 Cong. Rec. S2966-2970 (daily ed. Mar. 30, 1982). The Conference Committee rejected that proposal. See H.R. Rep. No. 884 at 50-52. Instead, it drafted new language requiring DOE, whenever imported uranium exceeded 37½ percent of domestic re-

<sup>4</sup> Congress understood that the concern over the importation of foreign uranium was a concern over "imports of foreign uranium for enrichment and sale on the domestic market[.]" *id.* at 3120, and it understood that restrictions on the enrichment of foreign uranium were *de facto* restrictions on the importation of foreign uranium, since uranium in its natural state would be valueless to a United States importer who could not have that uranium enriched in this country.

quirements in any consecutive two-year period, to revise its enrichment criteria immediately "to enhance the use of source material of domestic origin . . . ." *Id.* at 17;<sup>5</sup> see also 128 Cong. Rec. S13,053-13,055 (daily ed. Oct. 1, 1982). The House of Representatives rejected that version, too. See 128 Cong. Rec. at H8802-8809; 128 Cong. Rec. S15,316-15,317 (daily ed. Dec. 16, 1982).<sup>6</sup>

As enacted, section 2210b requires DOE to issue an annual report on the viability of the domestic uranium industry and to establish specific criteria—including certain criteria enumerated by Congress—to be assessed in the annual reports. 42 U.S.C. § 2210b(a), 2210b(c). Section 2210b also authorizes the Secretary of DOE to determine, on the basis of the factual findings contained in such reports, whether imports of foreign uranium satisfy the statutory threshold for a successful "escape clause" action under existing trade laws—namely, whether imports are a "substantial cause of serious injury, or threat thereof," to the domestic industry. *Id.* § 2210b(d). If the Secretary so determines, the United States Trade Representative is required to initiate an escape clause action, which could result in the imposition of quotas, higher tariffs, adjustment assistance to help workers in the industry find new employment, or other relief measures. *Id.*; see also 19 U.S.C. § 2251 (escape

<sup>5</sup> "These modifications should provide for the greater use of uranium in the enrichment process and the increased increment of uranium should be restricted to uranium of domestic origin." H.R. Rep. No. 884 at 52.

<sup>6</sup> The Committee had also proposed to bar all contracting for foreign uranium (i) during the pendency of certain import-related trade law investigations (ii) triggered by a nonviability finding in (iii) any annual report DOE would be required to conduct on the state of the domestic uranium industry. H.R. Rep. No. 884 at 50-52. This series of contingent events leading to the automatic imposition of restrictions on contracting for uranium imports was equally objectionable to the House of Representatives. See 128 Cong. Rec. at H8802-8809.

clause investigation). Further, section 2210b specifies that whenever the Secretary determines that contracts or options involving source material or special nuclear material from foreign sources account for more than 37½ percent of domestic requirements for two consecutive years, or threaten to impair national security, he is required to request the Secretary of Commerce to initiate a "national security" investigation under existing trade laws, which also could culminate in the adjustment of import levels. 42 U.S.C. § 2210b(e); see also 19 U.S.C. § 1862 (national security investigation).

In short, after extensively considering whether to amend the statutory framework under which DOE makes enrichment services available for uranium imported from foreign countries, Congress left that framework—along with DOE's interpretation of its duties within that framework—intact. "This failure to change the scheme under which the [agency] operate[s] is significant, for a 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Young v. Community Nutrition Institute*, 106 S. Ct. at 2366, quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

#### **B. DOE's Interpretation Of Its Authority Is Supported By The Department's Detailed Consideration Of The Regulatory Scheme It Administers And The Competing Interests Of The Utilities And The Uranium Industry.**

Even if this Court should determine that, despite the persuasive legislative history supporting the plain meaning of section 2210(v), there is no "unambiguously expressed intent of Congress," *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. at 843, DOE's interpretation of its statutory responsibilities—and its decision not to impose enrichment restrictions because they would not "assure the maintenance of a viable domestic uranium industry"—should be given effect as a "reason-



able interpretation made by the administrator of an agency." *Id.* at 844. Accord *American Paper Institute v. American Electric Power Service*, 461 U.S. 402, 423 (1983); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. International Union of Electrical Workers*, 367 U.S. 396, 408 (1961). See also *NLRB v. United Food & Commercial Workers Union*, — U.S. —, 108 S. Ct. 413, 419-420 (1987) (demonstrating "the continuing and unchanged validity of the test for judicial review of agency determinations of law set forth in *Chevron*") (Scalia, J., concurring).

In judging whether an agency's interpretation is reasonable and entitled to deference, this Court has considered whether "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and [its] decision involve[d] reconciling conflicting policies." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. at 865 (citations omitted). Clearly, the regulatory scheme DOE administers pursuant to section 2201 and related sections of the Atomic Energy Act, as amended, is technical and complex. See, e.g., 10 C.F.R. Pt. 761 (1987) (criteria for determining viability of the domestic uranium industry).

It is equally clear that DOE has considered the matter of enrichment restrictions, and their effect on the viability of the domestic uranium industry, in a detailed and reasoned fashion. See, e.g., Energy Information Adm., DOE, Domestic Uranium Mining and Milling Industry: 1984 Viability Assessment (1985); Herrington Memo.; 51 Fed. Reg. at 3624; 51 Fed. Reg. at 27,132. As the Department most recently articulated the rationale for its determination under section 2201(v):

The plain language of the statute makes clear the restrictions are not to be imposed for their own sake. Rather, DOE has a duty to determine whether their imposition would achieve the statutory objective of

assuring the viability of the domestic industry. And, when DOE determines imposition would have a meaningless or counterproductive effect on this objective, DOE should not, and indeed, cannot impose restrictions.

51 Fed. Reg. at 15,632.

Moreover, in reaching its determination, DOE fully complied with the very procedures Congress established in 1982 as alternatives to revising the enrichment restriction guidelines of section 2201(v). Pursuant to section 2210b(a), the Department issued criteria—based on the factors enumerated by Congress—for determining the viability of the domestic uranium industry. 48 Fed. Reg. 45,746 (1983) (codified at 10 C.F.R. Pt. 761). Applying these criteria, DOE concluded that the domestic industry had been viable in 1983. Hodel Letter. In September 1985, however, the Department concluded that the industry had not been viable in 1984 and that the imposition of enrichment restrictions would not restore the industry to viability. Herrington Memo. Promptly thereafter, pursuant to his responsibilities under section 2210b(d), the Secretary of DOE requested the assistance of the United States Trade Representative in assessing whether the Department's findings of fact in its 1984 report would satisfy the statutory threshold for a successful "escape clause" action with respect to uranium imports. Letter to Yeutter. The Trade Representative advised the Secretary that they would not, based on his independent conclusion that the economic difficulties experienced by the domestic industry were the result of long-term market forces and could not be alleviated by preventing DOE from enriching foreign uranium. Yeutter Response.<sup>7</sup>

<sup>7</sup> The Trade Representative's conclusion was the product of expert judgment which carries a presumption of validity. Cf. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *Puerto Rico Maritime Shipping Authority v. FMC*, 678 F.2d 327, 335 (D.C. Cir.), cert. denied, 459 U.S. 906 (1982).

Finally, it is clear that DOE's decision not to impose enrichment restrictions involved reconciling manifestly competing interests. It should not be forgotten in the context of this litigation that a primary goal of the Private Ownership Act was to help restructure the atomic energy industry so that nuclear power could become "a major source of energy to meet our growing requirements for electricity." S. Rep. No. 1325 at 3113. Indeed, *the very first reason* given in the Senate report on the bill for enacting the legislation was to achieve normal economic conditions in the commercial uranium market so that domestic utilities could make and implement long-term plans—including fuel procurement commitments—to develop nuclear power as an alternative source of energy. *Id.* Thus, Congress intended to accommodate the electric utility industry's need for stable, long-range planning as well as the uranium industry's need for protection from substantial imports of foreign uranium for enrichment and sale on the domestic market, particularly during a period of limited demand for its product. *See id.* at 3120-3121. In 1964, however, the future demand for commercial applications of nuclear power looked promising. Indeed, Congress assumed that the civilian power industry and the uranium-producing industry shared common interests that the Private Ownership Act would help to promote. *Id.* at 3114-3115. More than two decades later, those interests have grown divergent, yet DOE remains the agency "charged with the administration of the statute in light of everyday realities." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. at 866. As such, DOE determined that where enrichment restrictions would not confer on the uranium industry the benefit sought by Congress—a state of viability—it would not impose those restrictions because of their cost to the nation's electric utility companies and their customers. *See* 51 Fed. Reg. at 27,134-27,135. The Department's decision was "a reasonable policy choice for the agency to make," *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. at 845, to which this Court

should defer. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 (1985); *Batterton v. Francis*, 432 U.S. 416, 426 (1977).

### III. THE DISTRICT COURT'S INJUNCTION, AFFIRMED BY THE TENTH CIRCUIT, REPRESENTS AN IMPROPER JUDICIAL INTRUSION INTO DOE'S RULEMAKING.

Section 2201(v) requires DOE to establish written criteria setting forth the extent to which the Department's enrichment services will be made available for imported uranium. Further, it requires DOE to submit its proposed criteria to Congress for a 45-day review period before they can take effect. Thus, even if a court ruled that DOE interpreted its responsibilities under section 2201(v) incorrectly, the only proper remedy would be for that court to order the Department to issue criteria specifying the extent to which new restrictions on enrichment of foreign uranium would apply. *Cf. Burlington Northern Inc. v. United States*, 459 U.S. 131, 141 (1982) ("federal-court authority to reject [Interstate Commerce] Commission rate orders for whatever reason extends to the orders alone, and not to the rates themselves"); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 545 (D.C. Cir. 1983) (vacating new rules without reinstating old rule "avoids any problem of [appellate] court overstepping its authority, and leaves it to the agency to craft the best replacement for its own rule"). Instead, by enjoining DOE to impose specific limits on its enrichment of foreign uranium, the courts below not only have ousted the Department of its primary jurisdiction over the promulgation of enrichment criteria, but they also have deprived Congress of its role in scrutinizing and approving the criteria.

The district court's willingness to issue such an injunction and the Tenth Circuit's willingness to affirm it represent improper judicial encroachments into administrative rulemaking. The injunction effectively substitutes

the judiciary's own enrichment criteria for those lawfully issued by DOE. "Such usurpation of administrative power . . . ill serve[s] the orderly operation of the federal government. Nor [does] such action pay proper respect to the division of power inherent in the Constitution and the Administrative Procedure Act, . . . ." *Colorado Public Interest Research Group v. Hills*, 420 F. Supp. 582, 586 (D. Colo. 1976). Cf. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 557 (1978).

For the same reason, the injunction deprives the Department of its primary jurisdiction over the issuance of enrichment criteria, even where the courts found fault with the absence of new criteria restricting enrichment of foreign uranium. The courts, while retaining the final authority to expound a statute, are required to avail themselves of the aid implicit in the agency's superior expertise concerning the subject matter in question. *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 305-306 (1973); see also *Conrail v. National Association of Recycling Industries*, 449 U.S. 609, 612 (1981). The authority to promulgate uranium enrichment services criteria was delegated by Congress, with good reason, to DOE, not to a federal court.

Section 2201(v) contains the 45-day review period requirement to ensure that any uranium enrichment criteria proposed by DOE become "subject to Congressional scrutiny." S. Rep. No. 1325 at 3120. By changing the effective enrichment criteria immediately, the injunction would circumvent the process of scrutiny and approval that Congress expressly reserved for itself.

## CONCLUSION

For the foregoing reasons, the opinion of the court of appeals should be reversed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

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F. CLARK HUFFMAN, *et al.*,  
*Petitioners*

v.

WESTERN NUCLEAR, INC., *et al.*

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On a Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

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**BRIEF OF THE GOVERNMENT OF AUSTRALIA AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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### QUESTION PRESENTED

The Government of Australia will address the following question upon which this Court granted certiorari:

Does Section 161(v) of the Atomic Energy Act of 1954 (42 U.S.C. § 2201(v)) require the Department of Energy to restrict enrichment of foreign source uranium whenever the domestic uranium industry is not viable, whether or not the imposition of such restrictions would make the domestic industry viable?

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**BRIEF OF THE GOVERNMENT OF AUSTRALIA AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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Having obtained the written consent of the parties pursuant to Rule 36.1 of the Rules of this Court, the Government of Australia submits this brief as amicus curiae in support of Petitioners.

**INTEREST OF THE GOVERNMENT OF AUSTRALIA**

The United States is the world's largest commercial market for uranium. Australia has the largest uranium reserves of any non-Communist country and has been a reliable and stable supplier of uranium to the United States. U.S. electric utilities have entered into long-term

contracts through 2005 to purchase more than 15,000 short tons of uranium from Australia worth hundreds of millions of dollars.<sup>1</sup> The Australian uranium industry has made very substantial investment and trading decisions in reasonable reliance on the expectation of continued access to the U.S. market.

As one of the United States' closest allies, the Commonwealth of Australia is a party with the United States in numerous international trade and nuclear non-proliferation agreements. Since 1970 the Australian and United States Governments have cooperated closely in international fora in promoting the objective of non-proliferation under the Nuclear Non-Proliferation Treaty.<sup>2</sup> As part of this cooperative commitment, Australia has consciously circumscribed the commercial outlets available to its domestic uranium industry in order to add further impetus to the non-proliferation objective and to seek to strengthen the applicability of nuclear safeguards.

The decision of the court below requires the U.S. Department of Energy to terminate the provision of all enrichment services to foreign uranium intended for use in the United States. Even though this would not directly prohibit the importation of unenriched uranium, its practical effect would be to restrict such importation. If not overturned, that judicial reversal of current Executive Branch international trade policy will, in the view of the Australian Government, place the U.S. Gov-

<sup>1</sup> It has been estimated that, for the period between 1985 and 1990, U.S. utilities have contracted for about \$780 million worth of foreign uranium. Emergency Motion of the Appellants for Stay Pending Certiorari to the United States Supreme Court at 7 (filed in *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430 (10th Cir. 1987) (No. 86-1942)).

<sup>2</sup> Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483; T.I.A.S. No. 6839; 729 U.N.T.S. 161.

ernment in violation of its obligations to the Australian Government under the General Agreement on Tariffs and Trade ("GATT").<sup>3</sup> It will also do serious injury to the Australian uranium industry, which relies solely upon exporting. The flow of Australian uranium to the United States will be severely restricted, and U.S. utilities may be caused to breach their very substantial long-term supply contracts with Australian uranium producers.

On several occasions the Australian Government has officially notified the U.S. Government of its concern over the lower courts' decisions in this case and its view that compliance with their orders would breach Australia's entitlements and the U.S. Government's commitments under the GATT.<sup>4</sup>

### SUMMARY OF ARGUMENT

The lower court has interpreted Section 161(v) of the Atomic Energy Act of 1954 to mean that, if the domestic industry is not viable, restrictions on enrichment of foreign source uranium for U.S. end-use "must be imposed and become increasingly aggressive, to the point of 100% restriction, until the domestic industry is rejuvenated and becomes viable." 825 F.2d at 1439. This interpretation is erroneous. The statute should be construed as petitioners maintain.

Congress expressly intended Section 161(v) to be consistent with the GATT, which is a part of U.S. law. Therefore, under this Court's long established rules of statutory construction, Section 161(v) should be construed so as not to bring it into conflict with the GATT. The lower court's interpretation of the statute obviously

<sup>3</sup> October 30, 1947, 61 Stat. pts. 5, 6; T.I.A.S. No. 1700; 55 U.N.T.S. 61.

<sup>4</sup> See Diplomatic Note No. 186/86A (June 27, 1986) reprinted as Appendix No. 1 to this Brief; Diplomatic Note No. 237/87 (July 24, 1987) reprinted as Appendix No. 2 to this Brief.



denies Australian uranium "national treatment" in violation of Article III of the GATT, particularly when it is considered that the Executive Branch officials in charge of U.S. energy policy have concluded that foreign uranium is not the cause of the domestic industry's non-viability, and the restriction will not rejuvenate the industry. Similarly, a Department of Energy action implementing the lower court's interpretation should be deemed improper under Article XI of the GATT because it would be a "measure" restricting the import of Australian uranium into the United States. Even though the lower court's interpretation of Section 161(v) would not prohibit imports of unenriched uranium directly, its practical effect would be to cripple such imports since they are nearly always made for the purpose of obtaining enrichment by the Department of Energy.

Moreover, the Executive Branch of the U.S. Government believes, correctly, that the lower court's decision will impact adversely U.S. and Australian nuclear non-proliferation policies by causing doubt as to whether the U.S. Government will adhere to its other international commitments if it does not adhere to its GATT commitments with respect to the importation of uranium.

The U.S. Government's Cabinet officials responsible for international trade and energy policy have adopted an interpretation of Section 161(v) consistent with Congress' intent and with the U.S. Government's GATT obligations. The courts should not substitute their own interpretation which will place the U.S. Government in violation of its GATT obligations and will cause the U.S. Government to speak to its close allies with several inconsistent voices on this important matter of international law and policy.

## ARGUMENT

### CONGRESS INTENDED SECTION 161(v) TO BE CONSISTENT WITH THE GATT, WHICH IS A PART OF U.S. LAW, AND THE LOWER COURT'S INTERPRETATION OF THAT STATUTE CANNOT BE RECONCILED WITH THE GATT

#### A. The GATT is Part of U.S. Law

The GATT is a multilateral international agreement to which Australia and the United States are parties. This Court has stated that the GATT "is followed by every major trading nation in the world . . . ." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457 (1978). In the United States, the GATT has been applied provisionally since 1948 pursuant to the Protocol of Provisional Application of the GATT. See 61 Stat. pts. 5, 6; T.I.A.S. No. 1700; 55 U.N.T.S. 61. The portions of the GATT relevant to this case have been proclaimed by the President, Proclamation No. 2761A, T.D. 51802, 82 Treas. Dec. 305 (1947), and, consequently, are part of the domestic law of the United States. *United States v. Accurate Millinery Co.*, 42 C.C.P.A. 229, 230 (1955); *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F. Supp. 1219, 1222 (C.D. Cal. 1973) *aff'd in part, rev'd in part on other grounds*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission*, 381 A.2d 774, 778 (N.J. 1977), *appeal dismissed*, 435 U.S. 982 (1978). See Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 Mich. L. Rev. 249, 293 (1967).

This Court's long standing rules for interpreting Federal statutes in light of international agreements entered into by the U.S. Government have been summarized as follows by the American Law Institute in Section 134 of the RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tent. Final Draft 1985):

Where fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law or with an international agreement of the United States.<sup>5</sup>

In addition, Section 135(1)(a) provides that:

An Act of Congress supersedes an earlier . . . provision of an international agreement as law of the United States if the purpose of the Act to supersede the earlier rule or provision is clear and if the Act and the earlier rule or provision cannot be fairly reconciled.

The Draft Restatement also notes the importance this Court has attached to the branches of the U.S. Government "speaking with one voice" on international matters and the consequent court practice of giving "particular" or "great" weight to the views of the Executive Branch in international matters. *Id.* at § 132, comment C. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (interpretation of U.S. Friendship, Commerce and Navigation treaty with Japan).

In this case the Executive Branch has interpreted Section 161(v) in a manner consistent with the U.S. Government's international obligations. The lower courts erroneously rejected that interpretation and the clear legislative history supporting it.

#### **B. Congress Intended Section 161(v) to be Consistent with the GATT**

When Congress passed Section 161(v) in 1964 it was mindful of the U.S. Government's obligations under the GATT and intended the statute to be consistent with those obligations. The Report of the Joint Committee on Atomic Energy explaining Section 161(v) states:

<sup>5</sup> Citing *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953), *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) and other decisions of this Court.

[T]he committee believes that these reasonable and flexible restrictions on the performance of services by the . . . U.S. Government should not in any sense be deemed inconsistent with any obligations the United States may have under the General Agreement on Tariffs and Trade (GATT) and other international trade agreements.

S. REP. NO. 1325, 88th Cong., 2d Sess., reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 3105, 3121.

This expression of a Congressional intent to legislate consistently with the U.S. Government's GATT obligations could not be more clear.

In order to understand how the lower court's interpretation of Section 161(v) is inconsistent with the U.S. Government's GATT obligations, a brief review of those obligations is required.

#### **C. Relevant GATT Obligations**

##### **1. "National Treatment"**

In Article III(1) of the GATT, the parties recognize the general principle that a contracting party's domestic laws should not be applied against the products of other contracting parties "so as to afford protection to domestic production." Pursuant to this general principle, Article III(4) provides, in relevant part:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

According to the leading U.S. authority on the GATT, this "national treatment" provision means that "imported goods will be accorded the same treatment as goods of local origin with respect to matters under government



control, such as taxation and regulation." J. Jackson, *WORLD TRADE AND THE LAW OF GATT* 273 (1969).

In this case, the lower court's interpretation of Section 161(v) mandates that foreign origin uranium be treated differently from U.S. origin uranium. That difference in treatment relates to a matter under the U.S. Government's control—refusal to provide enrichment services to foreign origin uranium for U.S. end-use. That difference in treatment obviously is intended to favor U.S. origin uranium and would affect unfavorably the internal sale of foreign origin uranium in the United States. Consequently, the lower court's interpretation denies "national treatment" to foreign origin uranium within the meaning of Article III(4) of the GATT.

## 2. *Unhindered Entry into the U.S. Market*

Article II(1)(a) of the GATT requires that the U.S. Government accord Australian uranium "treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule" annexed to the GATT. Under the "Kennedy Round" of GATT agreements, imports of uranium from Australia are entitled to tariff free entry into the United States.<sup>6</sup>

In order to ensure that the concessions such as the free entry of Australian uranium granted under Article II(1)(a) are not negated by other domestic measures, Article XI(1) of the GATT prohibits the U.S. Government's imposition of restrictions "other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or *other measures* . . .

<sup>6</sup> Uranium from Australia enters the United States in several different forms under different U.S. Tariff Schedule Item Nos., *i.e.*, TSUS 422.50; 422.52 and 601.57. Each of these is at a rate of duty of "free." II GEN. AGREEMENT ON TARIFFS AND TRADE, LEGAL INSTRUMENTS EMBODYING THE RESULTS OF THE 1964-67 TRADE CONFERENCE, sched. XX, pp. 1467, 1562 (1967).

on the importation of any product of the territory of any other contracting party . . ." (emphasis added).

This language is very broad.<sup>7</sup> Thus, action by the Department of Energy implementing the lower court's order could be deemed to be a restriction on "importation" prohibited by Article XI. If the restriction is deemed to apply after "importation," the "national treatment" guarantees of Article III apply to protect the foreign item. See J. Jackson, *WORLD TRADE AND THE LAW OF GATT* at 315.

## D. Arguments Challenging the Relevance of GATT Obligations

In their Brief in Opposition to the Petition for Certiorari filed in this case Amici States offered two arguments challenging the relevance of the GATT obligations discussed above. These arguments are without merit.

### 1. *The U.S. Trade Representative Did Not Inform Congress that the Proposed Implementation of Section 161(v) Will Not Violate GATT*

In a single sentence in their Brief, Amici States contend that "[t]he United States Trade Representative has informed Congress that implementation of section 161v will not violate GATT." Amici States' Brief at 17. The only support cited for this statement is a July 15, 1985 letter from Trade Representative Yeutter to Congressman Udall which is cited for the proposition that "enrichment limitation does not infringe GATT because it is a condition under which U.S. government renders a serv-

<sup>7</sup> The United States has itself invoked Article XI in the context of the trade in uranium. In December 1986 the U.S. Government sought consultations with Canada under Article XXIII(1) of the GATT because of the alleged infringement of U.S. rights under Article XI(1) arising from Canadian restrictions on the export of unprocessed uranium. See "Canada—Restrictions on Export of Unprocessed Uranium," GATT Doc. L/6104 (Dec. 12, 1986).



ice." *Id.* at 17 n.40. The proposition quoted does not appear in the text of the letter.

The cited letter contains five pages of written answers by the U.S. Trade Representative to questions raised by Congressman Udall and the Subcommittee on Energy and the Environment. The only written answer that appears to be related to the statement made by Amici States arose in the following exchange:

Question 2. Mr. Reinstein [of the U.S. Trade Representative's Office], you stated that if we were to take a trade-restrictive action against a friendly trading partner, we could be subject to retaliatory actions against some other industry. However, restrictions on enrichment of foreign source uranium were in place, to some extent, until 1984. Why is this situation different from restrictions originally put in place pursuant to section 161(v) of the Atomic Energy Act?

Answer. The restrictions put in place in the 1960's pursuant to section 161(v) were not direct restrictions on uranium imports but rather limitations on the use of U.S. government owned and operated facilities for the enrichment of uranium. As such, these restrictions were not inconsistent with our GATT obligations. However, a restriction on imports, *e.g.*, quotas, could be challenged in the GATT and could give rise to retaliation.

This answer clearly is not a statement by the U.S. Trade Representative that implementation of Section 161(v) to protect the domestic industry will not violate GATT when such a restriction on the enrichment of foreign source uranium will not make the domestic industry viable. Moreover, the answer expressly addresses restrictions "in the 1960's."

In any event, Amici States' assertion, apparently based on the above quoted answer, that the restrictions on enrichment of foreign source uranium imposed by the

lower court here do not violate GATT because the enrichment facilities are controlled by the U.S. Government, is incorrect.

The fact that the U.S. Government maintains a monopoly over U.S. enrichment facilities does not relieve it of its "national treatment" obligations under Article III of the GATT. The U.S. Government is permitted to operate such a monopoly under Article XX of the GATT subject to the requirement that such a monopoly is not operated in a manner which would constitute "a disguised restriction on international trade." Similarly, Article XVII(1)(a) of the GATT permits the U.S. Government to establish a "state trading enterprise" so long as such an enterprise "shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders." As Professors Jackson and Davey have pointed out, a GATT commitment to eliminate a tariff on a particular commodity, such as the commitment to permit tariff free entry of Australian uranium into the United States, "would be valueless, if there were not some limitations on the types of internal taxation or regulation which a country could impose to afford protection against such imports." J. Jackson & W. Davey, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 484 (2d ed. 1986).

In sum, the U.S. Trade Representative did not inform Congress that implementation of Section 161(v) in the circumstances of this case would not violate GATT. Moreover, if he had made such a statement he clearly would have been wrong.

**2. It is Irrelevant that Australia Did Not Pursue GATT Claims Against the United States Between 1966 and 1983**

Amici States contend that Australia did not pursue GATT claims against the United States between 1966-1983 "presumably because" it recognized that such claims would not be fruitful. Amici States' Brief at 17-18. That presumption is erroneous. The discovery and development of major deposits of uranium in Northern Australia which enabled Australia to become a major producer and exporter of uranium did not occur until the early 1970s.<sup>8</sup> Prior to 1970 Australia was not a major producer of uranium.<sup>9</sup> On December 13, 1971, the Australian Government, in response to a decision of the U.S. Government of October 13, 1971 to continue restrictions, submitted an *Aide Memoire* to the U.S. Government stating its concern over the slow pace of the U.S. Government's removal of its embargo on the domestic enrichment of foreign uranium.<sup>10</sup> This was done against the background of Australia seeking contracts for the newly discovered uranium deposits. In the early 1970s, Australian producers concluded some significant export contracts for deliveries commencing from 1976. In 1973 the U.S. Government solicited comments on the advisa-

<sup>8</sup> Austln. Bureau of Mineral Resources, Geology & Geophysics, AUSTLN. URANIUM RESOURCES 3 (1987).

<sup>9</sup> *Id.* at 5.

<sup>10</sup> That *Aide Memoire* stated in part:

The retention of the embargo [on domestic enrichment of imported uranium] past the mid 1970's and especially the fact that at this stage there is still no definite date set for its relaxation, could have a dampening effect on the development of Australia's uranium resources, particularly as this industry is characterized by long term supply contracts.

*Aide Memoire* to the U.S. Gov't from the Gov't of Austl. (Dec. 13, 1971) reprinted as Appendix No. 3 to this Brief.

bility of phasing out restrictions on enriching foreign uranium. See Restrictions on Enrichment of Foreign Uranium for Domestic Use, 38 Fed. Reg. 32,595 (1973) (Atomic Energy Comm'n). In 1974 the U.S. Government announced the schedule for such a phase out, which began in 1977 and was completed in 1984. See Foreign Uranium for Domestic Use, 39 Fed. Reg. 38,016 (1974) (Atomic Energy Comm'n).

During 1973-1977 there was very little activity in the Australian uranium industry because of a decision by the Australian Government not to allow any new contracts pending the outcome of a substantial environmental inquiry concerning uranium development in Australia. In May 1977 after the environmental inquiry was completed and the phase out of the U.S. embargo had begun, the Australian Government permitted uranium producers to pursue new contracts. This coincided with the commencement of the U.S. Government's schedule for the phasing out of restrictions referred to above. Between 1977 and 1984 several contracts were signed with U.S. utilities who found the higher grade Australian ore and lower Australian production costs attractive.<sup>11</sup>

Thus, in these circumstances there was no basis and no need for Australia to pursue GATT claims against the U.S. Government between 1966 and 1983.

**E. The Correct Interpretation of Section 161(v)**

The U.S. Secretary of Energy, after thorough and careful study, concluded that the proper interpretation of Section 161(v) is that, if the domestic uranium industry is not viable, restrictions pursuant to Section 161(v) are

<sup>11</sup> It is also noteworthy that more than 37% of the foreign origin uranium under contract for delivery to the United States between 1985 and 1990 has been purchased by U.S. uranium producers who have chosen to purchase uranium abroad for resale rather than to produce it themselves. Uranium Enrichment Services Criteria, 51 Fed. Reg. 27,132, 27,135 (1986) (Dep't Energy) (Supplementary Information).



to be imposed only if they "are needed to, and in fact, will assure the maintenance of a viable domestic uranium industry." Uranium Enrichment Services Criteria, 51 Fed. Reg. 27,132, 27,134 (1986) (Dep't Energy) (Supplementary Information). He also concluded that "structural weaknesses, not foreign competition, are the reasons for the depressed state of the domestic uranium industry" and that "restrictions would not assure the viability of the domestic mining and milling industry." *Id.* at 27,135.

The U.S. Trade Representative, the Cabinet official responsible for the U.S. Government's international trade policy, concluded that, in these circumstances, restrictions imposed pursuant to Section 161(v) would have "an adverse impact on our trade and other relations with important trading partners without resolving the long-term problems of the industry." Letter from U.S. Trade Representative Clayton Yeutter to Secretary of Energy John Herrington (Dec. 26, 1985). In a declaration filed with the district court in this case, the Director of Energy Trade Policy in the U.S. Trade Representative's office stated:

A ban on enrichment of foreign uranium would harm the commercial interests of other major trading partners such as Australia. Such a ban would be subject to legal challenge under the General Agreement on Tariffs and Trade (GATT). GATT Article III broadly prohibits member nations from adopting rules or regulations which affect the internal sale, distribution or use of goods, and which discriminate against foreign suppliers of such goods. Even if the stated ban were considered defensible under the national security exception of GATT Article XXI, the United States might be found to owe compensation to our trading partners for the "nullification or impairment" of their benefits under the GATT. In this case, other sectors of the U.S. economy would be asked to make sacrifices for any short-term relief provided for the uranium industry.

Declaration of Robert A. Reinstein, ¶ 8 (filed in *Western Nuclear, Inc. v. Huffman* (D. Colo.) (No. 84-2315)).<sup>12</sup>

Although Amici States argue that Congress adopted Section 161(v) "at least in part for national security reasons," Amici States' Brief at 15, the U.S. Government has not claimed an exemption under Article XXI, the national security provision of the GATT.<sup>13</sup>

<sup>12</sup> In a letter to Congressman Morris K. Udall, the Trade Representative had made the same point.

Import restrictions that are otherwise inconsistent with the GATT may be taken pursuant to the security exception provisions of GATT Article XXI. The United States and other GATT signatories have invoked this exception very infrequently because of its potential for abuse. Moreover, the drafting history of Article XXI makes it clear that the country invoking the security exception is expected to compensate its trading partners adversely affected by the import restriction by providing concessions on other items of trade. Failure to agree on such compensation could lead to retaliation by the trading partners.

Letter from U.S. Trade Representative Clayton Yeutter to Congressman Morris K. Udall (July 15, 1985).

<sup>13</sup> Article XXI(b)(i) provides that nothing in the GATT shall be construed:

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived.

In a letter to the Secretary of Energy, the Trade Representative explained why, in the circumstances of this case, it would be inappropriate for the U.S. Government to seek relief from imports of foreign uranium pursuant to Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, which provides relief if imports are found to be threatening U.S. national security. He stated that "[u]ranium for military uses is not an issue here, but only uranium for commercial electric generation." Letter from U.S. Trade Representative Clayton Yeutter to Secretary of Energy John Herrington (Dec. 26, 1985). This reasoning would also make Article XXI(b)(i) inapplicable to the situation at issue in this case.



Thus, having carefully considered the reasons for the domestic industry's non-viability, and in light of the U.S. Government's GATT obligations and Congress' intent, the responsible Executive Branch officials adopted an appropriate interpretation of Section 161(v). This interpretation is consistent with the U.S. obligations under the GATT which limit actions restricting imported products, *i.e.*, restrictions need not be imposed if they will not assure the maintenance of a viable domestic industry.

These Executive Branch officials also were mindful of the adverse impact that banning enrichment of foreign uranium for U.S. end-use would have on American and Australian nuclear non-proliferation policies. The Deputy Assistant Secretary of State for Nuclear Energy and Energy Technology Affairs stated, in relation to this litigation, that prohibition of enrichment of foreign uranium would create "an increased commercial incentive for the spread of nuclear enrichment technology, which has potential nuclear weapons applications." Declaration of James Devine, *cited in* 51 Fed. Reg. 27,132, 27,137 n. 15 (1986) (Dep't Energy) (Final Rule, Uranium Enrichment Services Criteria). He added:

The United States Government has for many years sought to establish a reputation for the United States as a reliable nuclear trading partner as a vital component of United States non-proliferation policy. Unless the "rules of the game" for nuclear cooperation with the United States are consistent and clear, there is the risk that such cooperation will be diminished and that the credibility and influence of the United States on nuclear non-proliferation matters in both bilateral and multilateral contexts will be undermined.

*Id.*

Amici States argue that these Executive Branch concerns over the impact of the lower court's holding on U.S. nuclear non-proliferation efforts are "highly im-

plausible" and "at best empty rhetoric" because the injunction prohibits neither the enrichment of foreign uranium for foreign use nor sales of U.S. nuclear material to foreign governments. Amici States' Brief at 19. Amici States' argument betrays a misunderstanding of the issue, perhaps because they have no responsibility for conducting U.S. nuclear non-proliferation policy. The U.S. Government has entered into several multilateral agreements with Australia and other nations which are designed to control the spread of nuclear technology. *See, e.g.*, Statute of the International Atomic Energy Agency<sup>14</sup> and the Treaty on the Non-Proliferation of Nuclear Weapons.<sup>15</sup> These agreements promote international cooperation in the peaceful uses of nuclear energy and impose concomitant obligations on the participating governments. If the U.S. Government is perceived to be in violation of its obligations under another important treaty—the GATT—with respect to the importation of uranium for the production of electricity from nuclear energy, there may well be an adverse impact on cooperation in the nuclear non-proliferation regime. Implementation of the lower court's restrictions on the enrichment of foreign source uranium might well be seen by the international community as a threat to international cooperation because it would raise fears as to the reliability of the U.S. Government as a partner in this area. Such a perception of unreliability could well lead to adverse consequences for the non-proliferation regime which Australia and the United States have worked together to maintain and strengthen.

The U.S. Government, which is responsible for conducting U.S. nuclear non-proliferation policy, has cited this potential damage to the Executive Branch's nuclear

<sup>14</sup> *Opened for signature* Oct. 26, 1956, 8 U.S.T. 1093; T.I.A.S. No. 3873; 276 U.N.T.S. 3.

<sup>15</sup> *See* note 2 *supra*.

non-proliferation policies as one of the reasons supporting this Court's review of the decision below. Petition for Writ of Certiorari to the United States Court of Appeals for Tenth Circuit at 26-27. The Australian Government supports that reasoning.

In sum, the Australian Government submits that well established rules of statutory interpretation require that Section 161(v) be interpreted so that it will be consistent with the U.S. Government's international agreements. The officials of the Executive Branch responsible for the implementation of U.S. international trade agreements and energy laws have made such an interpretation. That reading must be preferred over the lower court's interpretation which constitutes a judicial reversal of Executive Branch trade policy and which could, inconsistently with the intent of Congress, place the U.S. Government in breach of its international obligations to some of its closest allies.

#### CONCLUSION

The decision of the lower court should be reversed.

Respectfully submitted,

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February 25, 1988

## **APPENDICES**



## APPENDIX NO. 1

[Australian Embassy Seal]

Note No. 186/86A

The Embassy of Australia presents its compliments to the Department of State and has the honour to refer to a decision of the United States District Court in Denver, Colorado on 20 June 1986 to provide injunctive relief to the domestic uranium industry by, inter alia, restricting the enrichment of foreign uranium in the Department of Energy's (DOE) facilities under Section 161(V) of the Atomic Energy Act. The decision of the Court, with effect from 6 June 1986, restricts enrichment of foreign uranium for end-use in the United States to a maximum of twenty five percent of material enriched in U.S. facilities in the period to 31 December 1986, and prohibits DOE from offering or providing enrichment services for such foreign uranium from 1 January 1987.

This decision will disrupt the world market for uranium, erode international confidence in the reliability and predictability of United States policies affecting international co-operation in the peaceful uses of nuclear energy, and give rise to a major problem in trade relations between our countries in that it will impact adversely and unfairly on Australia's exports of uranium to the U.S.

The Australian Government requests the United States Government to appeal the Denver Court decision with a view to maintaining unimpaired access for Australian uranium to U.S. market and enrichment facilities.

Australia is a reliable and stable supplier of energy materials, including uranium, to the world market. It has the largest low-cost uranium reserves of any Western world country. The United States, for its part, is the world's largest commercial market for uranium. U.S.

electric utility companies have contracted to purchase a proportion of their uranium requirements from Australia up to and including 1998.

The injunctive order of the Denver Court will severely disrupt the commercial operations of the Australian uranium industry. It will immediately affect Australian material already located in, and presently being shipped to, the United States which has still to be converted, enriched and fabricated and the title to which has yet not passed to the U.S. electric utility purchasers. Moreover, it could void existing contracts with U.S. electric power utilities and prevent the negotiating of any future contracts.

Increased U.S. imports of foreign uranium have been incidental to, and a symptom rather than a cause, of difficulties encountered by the U.S. uranium industry. Those difficulties had their origins in the decision of the United States in 1966 in effect to embargo uranium imports, and in the ensuing severe disruption of the world and U.S. uranium markets. The effect of that decision was subsequently compounded by the impetus it gave to the development of some otherwise non-competitive U.S. uranium production, by declining U.S. uranium ore grades, by progressive and substantial reductions in earlier projected levels of nuclear generation capacity, in ventory buildups and the consequential further depressant effect on uranium market prices. The requirement of the U.S. long term fixed commitment enrichment contracts (introduced in 1974 in an atmosphere of a perceived long term supply shortage of uranium) that those enrichment contracts be supported by matching long term uranium supply contracts also contributed to the development of high cost and marginal U.S. uranium mining capacity which, in the event, could not be sustained in the face of deferred and lower than projected nuclear power generation capacity in the U.S. and elsewhere. Increased costs and delays arising from more

rigorous U.S. regulatory requirements affecting the construction and operation of nuclear power facilities have also been contributing factors. The Australian Government concurs in the assessment of the United States Trade Representative, Ambassador Yeutter, in his 24 December 1985 letter to DOE Secretary Herrington that "action under the U.S. Trade Statutes does not appear to be appropriate in regard to both the short and long term problems facing the domestic uranium mining and milling industry".

Australia and the United States have worked closely to foster international co-operation in the exploitation of nuclear energy for peaceful and verified purposes. Continued improvement in the international nuclear non-proliferation and safeguards regime is of vital importance to both countries and to the international community. Unilateral action by the United States against major uranium suppliers to the nuclear fuel cycle would prejudice the pursuit of these objectives by disrupting world nuclear trade.

Action that negates or constrains contractual uranium supply arrangements entered into with U.S. electric power utilities and involving the use of U.S. enrichment facilities will damage our bilateral trade and commercial relations. Aside from its effect on existing contractual arrangements with U.S. utilities, the Denver Court Order will mean that the displacement of foreign uranium by artificially-induced additional production of higher cost U.S. uranium will disrupt the remainder of the world uranium market. A further undesirable consequence could be the development of a two-tiered price for uranium in the world market. Such a development whereby U.S. consumers would be denied the ability to purchase energy inputs at prices comparable to those paid by its trading partners, would appear to be inconsistent with the U.S. national interest and inimical to the further liberalisation of the world trading system.

The effect of the Denver Court Order will be to exacerbate a growing imbalance of opportunity in our bilateral trade. The United States already has a more than two-fold favourable balance of trade with Australia, increasing in our 1984/85 fiscal year to a surplus of Dollars Australian 3.2 billion over U.S. imports from Australia. A major factor in that imbalance is the fact that up to one third of Australia's exports to the U.S. are already subject to non-tariff import constraints. In these and other circumstances described above, it would, in the Australian view, be totally unjustified to extend the range and level of U.S. trade barriers against imports from Australia.

The Denver Court Order does not, of course, invalidate or diminish the commitment of the United States under the General Agreement of Tariffs and Trade (GATT). Action in the terms embodied in the Court Order affecting Australian uranium imported into the United States would, in the view of the Australian Government, breach Australia's entitlements and U.S. commitments under the GATT.

The Embassy of Australia takes this opportunity to renew to the Department of State the assurance of its highest consideration.

[Australian Embassy Seal]

Washington, D.C.

27 June 1986

## APPENDIX NO. 2

[Australian Embassy Seal]

*Note No. 237/87*

The Embassy of Australia presents its compliments to the Department of State and has the honour to refer to a decision of the United States Court of Appeals for the Tenth Circuit on 20 July 1987 to affirm the decision of the District Court in Denver, Colorado, on 20 June 1986 to provide injunctive relief to the domestic uranium industry by, inter alia, restricting the enrichment of foreign uranium in the Department of Energy's facilities under Section 161(V) of the Atomic Energy Act.

Australia is a reliable, low-cost and stable supplier of uranium to the world market. These factors have been recognized by U.S. electric utility companies which have contracted for long-term purchases of Australian uranium to beyond 2000 and which are in the process of negotiating further long-term contracts.

An injunctive order to prohibit the Department of Energy from providing enrichment services for foreign uranium end-use in the U.S. could affect existing Australian contracts and prevent the signing of further contracts. Such a development would severely disrupt commercial operations of the Australian uranium industry which has reasonably based investment and trading decisions on the expectation of unhindered access to the U.S. market. Moreover, the displacement of Australian and other foreign sourced uranium by higher cost, protected U.S. material would disrupt the remainder of the world uranium market with uncertain consequences for future international co-operation in the peaceful uses of nuclear energy.

The effect of the decision to preclude foreign uranium from end-use in the U.S. will inevitably result in a resurgence in growth of otherwise non-competitive domestic



production and differential pricing between the U.S. and other world consumers. Such a development would not appear to be consistent with U.S. national interest or U.S. attitudes, recently expressed, towards liberalisation of world trade.

Exclusion of Australian uranium from the U.S. market will exacerbate a growing imbalance in our bilateral trade. The United States already has a more than two fold favourable balance of trade with Australia, increasing in our 1986 fiscal year to a surplus of \$A4.1 billion over U.S. imports from Australia. A major factor in this imbalance is the fact that up to one-third of Australia's exports to the U.S. are already subject to non-tariff import constraints. In these circumstances, it would be totally unjustified to extend the range and level of U.S. trade barriers to include uranium imports from Australia.

Additionally, the effective restriction of entry of Australian uranium to the U.S. market is clearly inconsistent with the U.S. GATT obligations and contrary to the declarations against protectionism made by the U.S. at Punta del Este.

The Australian Government requests the United States Government to seek a stay of the Court of Appeals' decision, to appeal the Court's decision and to adopt every other available mechanism, legal, administrative and legislative, to ensure that limitations of the Department of Energy's enrichment of foreign uranium for U.S. end-use are not brought into effect.

The Embassy of Australia takes this opportunity to renew to the Department of State the assurances of its highest consideration.

[Australian Embassy Seal]

Washington, D.C.

24 July 1987

### APPENDIX NO. 3

#### AIDE MEMOIRE

The Embassy of Australia presents its compliments to the Department of State and has the honour to refer to the October 13 proposals announced by the United States Atomic Energy Commission for the retention of its prohibition against the domestic enrichment of imported uranium for consumption in the United States and for the disposal of its fifty thousand ton stockpile of surplus natural uranium concentrates on domestic and foreign markets.

The recent discoveries of potentially major deposits of uranium in Northern Australia and hence the prospect that Australia will become a major producer and exporter of uranium, is the basic factor underlying Australia's real interest in the world uranium market. We have studied closely the above-mentioned proposals on future United States uranium supply policies with this in mind.

It has been the Australian Government's understanding from earlier U.S.A.E.C. statements that the restriction on the domestic utilization of imported uranium was to have been relaxed from around 1973. The Australian Government is most concerned that in their latest statement, the U.S.A.E.C. has proposed the retention of the import embargo until "the latter part of the present decade". The retention of the embargo past the mid 1970's and especially the fact that at this stage there is still no definite date set for its relaxation, could have a dampening effect on the development of Australia's uranium resources, particularly as this industry is characterized by long term supply contracts.

The Australian Government is also concerned that the Commission's proposal for the disposal of fifty thousand

tons of surplus uranium concentrates on domestic and foreign markets contains no explicit provisions designed to avoid disruption in markets outside the United States. Consistent with established practice, we would expect the United States administration to consult with interested Governments on stockpile releases where these releases could have a disruptive effect on the normal commercial trade of foreign suppliers.

The Australian Government would welcome the early announcement of a definite date for the relaxation of the import embargo on foreign uranium to assist the normalization of world trade in this commodity. In addition, the Australian Government wishes to register its desire that the United States should keep the situation with respect to stockpile releases under continuing review to ensure that these releases proceed in a controlled and orderly fashion so as not to further depress the world market for uranium.

The Embassy of Australia takes this opportunity to renew to the Department of State the assurances of its highest consideration.

Embassy of Australia

Washington, D.C.

13th December, 1971.

IN THE  
Supreme Court of the United States  
October Term, 1967

F. CLARK HOFFMAN, et al.,  
Petitioners  
v.

WESTERN NUCLEAR, INC., et al.,  
Respondents

On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

BRIEF OF THE GOVERNMENT OF CANADA  
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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February 26, 1968



### QUESTION PRESENTED

Whether the proviso "to the extent necessary to assure the maintenance of a viable domestic uranium industry" in 42 U.S.C. § 2201(v) *requires* the Department of Energy to exclude foreign uranium from access to the United States for enrichment and sale, even though the Department has found that the United States uranium industry is not viable, that such non-viability is not caused by imports of foreign uranium to be enriched in the United States, and that viability will not be restored if the embargo is imposed.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

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No. 87-645

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F. CLARK HUFFMAN, *et al.*,  
 v. *Petitioners*

WESTERN NUCLEAR, INC., *et al.*,  
*Respondents*

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On Writ of Certiorari to the United States  
 Court of Appeals for the Tenth Circuit

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**BRIEF OF THE GOVERNMENT OF CANADA  
 AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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**THE INTEREST OF AMICUS CURIAE**

The Government of Canada submits this brief in support of Petitioners \* because the decision below threatens important political, legal and commercial interests shared by Canada and the United States. Canada is the largest foreign supplier of uranium in the United States market and in the western world.<sup>1</sup> Canada has been a partner with the United States in the development of

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\* Petitioners and Respondents have both consented to the filing of this brief; the written consents are on file with the Clerk.

<sup>1</sup> Energy Information Admin., U.S. Dep't of Energy, *Domestic Uranium Mining and Milling Industry: 1986 Viability Assessment* 9 (1987) (hereinafter *1986 Viability Assessment*).

nuclear energy for peaceful purposes since World War II. The Canadian government was encouraged by the government of the United States to develop a uranium industry for the security and economic benefits of both nations in their North American alliance.

After passage of the Private Ownership of Special Nuclear Materials Act ("Nuclear Materials Act"), amending the Atomic Energy Act of 1954, the United States executive imposed an absolute embargo on enrichment by the United States of foreign uranium for use by United States utilities. This embargo caused severe damage to Canada's uranium industry. It also disrupted Canada-United States relations. The position advanced by the Respondents in this case, if successful, could have a comparable adverse impact.<sup>2</sup>

On January 2, 1988, President Reagan and Prime Minister Mulroney signed a comprehensive Free Trade Agreement ("FTA") between the United States and Canada. In one provision, the United States would specifically exempt Canada from any restrictions on the enrichment of foreign uranium under the Nuclear Materials Act. The joint signing of the FTA by the United States President and the Canadian Prime Minister does not moot Canada's substantial interest in the outcome of this case, however. The FTA will not enter into force until January 1, 1989, after an exchange of diplomatic notes certifying the completion of domestic legal requirements necessary to give effect to the treaty.

The government of Canada has an interest in the application of the national laws of its trading partner in a manner consistent with international legal obligations accepted by Canadian and American authorities. Both gov-

<sup>2</sup> The depth of the concern triggered by this case is expressed in a diplomatic note submitted by the government of Canada to the Department of State on July 22, 1987 (Diplomatic Note No. 194, Appendix A).

ernments have a long-standing interest in the development and application of international law. It has followed closely the relationship between the General Agreement on Tariffs and Trade ("GATT") and the national legal obligation of both Canada and the United States, with particular reference to a uranium fuel embargo, and may therefore bring to the Court's attention relevant considerations not directly addressed by the parties or other amici.

## STATEMENT

This case represents the latest chapter in a half-century of complex history between the United States and Canada regarding uranium.

### 1. Early Cooperation

In April 1941, President Roosevelt and Prime Minister MacKenzie King issued a joint declaration regarding cooperation for mutual protection ("Hyde Park Declaration"). This laid the foundation for a common North American defense industrial base, expressed in several ensuing bilateral agreements. This network of agreements has remained an important feature of the Canada-United States relationship underlying our common security interests.<sup>3</sup>

The Canadian uranium industry was developed, with encouragement from United States officials, mainly to supply United States Atomic Energy Commission ("AEC") needs, and during the ten-year period 1957-67 approximately 84 percent of Canada's total exports of uranium concentrates were shipped to the United States under long-term contracts.

In 1954, Congress passed the Atomic Energy Act, 68 Stat. 919 (codified at 42 U.S.C. § 2011 et seq. (1982)).

<sup>3</sup> See J. Fried, *The Impact of U.S. Export Controls on Trade Between Canada and the United States*, 11 Canada-United States L.J. 185, 189 (1986).

This gave the AEC monopoly ownership of enriched uranium in the United States. Uranium ore does not contain sufficient fissionable uranium (U-235) to be used as an energy fuel. It must be enriched in a process which increases the U-235 content. Until the late 1970's the only free-world enrichment facilities available to suppliers of uranium to U.S. utilities were operated in the United States by the U.S. government. Since then, however, The Netherlands, Great Britain, France, The Federal Republic of Germany, and The U.S.S.R. have opened enrichment facilities to private parties for the enrichment of commercial grades of uranium ore. As a result, the United States has now lost the monopoly over commercial uranium enrichment which it held well into the 1970's.

In 1959, the AEC announced that it would not contract further for Canadian uranium. This caused a depression in the Canadian uranium industry as long-term contracts expired. See T. Neff, *The International Uranium Market*, at 143 (1984). In 1964 Congress passed the Nuclear Materials Act here under review.<sup>4</sup> For the first time it authorized the private ownership of commercial nuclear fuel. The Act provided for the enrichment of such uranium ore in U.S. government-owned facilities.

## 2. The Embargo

By a 1966 regulation issued pursuant to the Nuclear Materials Act, the AEC began to allow contracting for the enrichment of domestic ore for sale in the United States, while refusing to enrich Canadian and other

<sup>4</sup> In relevant part, the Act states:

[T]o the extent necessary to assure the maintenance of a viable domestic uranium industry, [the DOE] shall not offer [uranium enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.

42 U.S.C. § 2201(v) (1986) (emphasis added).

foreign-source uranium for U.S. utilities. See *Uranium Enrichment Services Criteria*, 31 Fed. Reg. 16,479 (1966). By this action the AEC effectively excluded 70% of the then free world market for commercial uranium fuel from Canadian and other foreign competition. This resulted in a dramatic increase in the severity of the depression experienced by the Canadian uranium industry.<sup>5</sup>

This embargo remained totally in effect for 10 years. Beginning in 1977, it was gradually phased out, and was eliminated only in 1984. Throughout the embargo, the Canadian government took various actions to try to defend the interests of the Canadian uranium industry. Canada repeatedly protested to the United States with respect to the incompatibility of the U.S. embargo with United States obligations under the GATT.<sup>6</sup>

In 1971, Canada took the initiative with other producing nations in formulating and implementing an international marketing arrangement relating to what was left of the free world market after imposition of the U.S. embargo. This arrangement operated for approximately three years, from 1972 to 1975.

The export of commercial uranium from Canada required explicit approval of the government of Canada. Government control was effected through general ministerial directions issued to the Canadian Atomic Energy Control Board, among other measures. Even though the U.S. market was foreclosed to Canadian imports until the

<sup>5</sup> In Diplomatic Note No. 210 of August 4, 1969, Canada asserted to the United States that "Canada's industry is now operating at less than one-third of its current capacity—a capacity initially developed in response to U.S. requirements." It went on to state that Canadian exports of uranium ore had fallen to \$25 million, compared with more than \$300 million in exports a decade earlier.

<sup>6</sup> See, e.g., Diplomatic Note No. 359, from the Embassy of Canada (December 3, 1971) (attached hereto as Appendix B).



embargo was lifted, the U.S. Department of Justice convened an international uranium antitrust Grand Jury, and several private antitrust actions were maintained in U.S. courts. These actions sought to hold Canadian companies liable for breaches of U.S. antitrust law, notwithstanding that the companies were complying with Canadian law and policy established in reaction to anticompetitive market manipulation put in place by United States officials.<sup>7</sup>

The Canadian government vigorously and repeatedly asserted that the exercise of jurisdiction by U.S. courts in these proceedings violated international law.<sup>8</sup> The Grand Jury investigation led to the criminal prosecution of a Canadian corporation acting in furtherance of explicit Canadian policy (*United States v. Gulf Oil Corp.*, No. 78-123 (W.D. Pa., filed May 9, 1978)), and the private antitrust suits led to substantial monetary recoveries against Canadian and other enterprises.

### 3. Recent Events

The two-decade embargo ended in January 1984. Before the year was out, the Respondents, three United States uranium producers, brought this action in the United States District Court for the District of Colorado. They claimed that the Department of Energy ("DOE"), as successor to the AEC, had violated the Nuclear Materials Act by its failure to impose a new embargo on the U.S. enrichment of foreign uranium for use by United States utilities. The Department had made a finding that

<sup>7</sup> See, e.g., *In Re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980); *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed and cert. denied, 451 U.S. 901 (1981).

<sup>8</sup> See, e.g., *In Re Uranium Antitrust Litigation*, 617 F.2d at 1253; Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad*, 11 Cornell Int'l L.J. 195, 202 (1978).

the U.S. uranium industry was not viable for 1984 and has since found that the industry was not viable during 1985. *1986 Viability Assessment* at ix.

In considering the reasons for its determination of non-viability, the DOE found specifically that the non-viability was not caused by imports of foreign uranium for U.S. enrichment. Non-viability was found instead to be the result of two principal factors: (1) the U.S. industry is unable to meet low cost foreign competition in foreign markets; and (2) the demand for commercial uranium fuel is significantly below anticipated levels, so that overwhelming excess of supply has depressed fuel prices—a market condition which will prevail regardless of whether a new embargo is imposed.

The DOE also concluded that a new embargo would be futile because the U.S. has lost market power over the enrichment of commercial uranium. This is because foreign uranium would still find its way to U.S. utilities via foreign enrichment, even if a new embargo were imposed.<sup>9</sup>

In June 1986, the District Court granted the Respondents summary judgment. Its order required the DOE to reimpose a full embargo, whether or not the embargo would restore the domestic industry to a state of viability. Appeal was taken to the United States Court of Appeals for the Tenth Circuit, which, on July 20, 1987, affirmed the District Court's decision and order. 825 F.2d 1430 (10th Cir. 1987). In holding that the statute required the DOE to suspend enrichment of foreign uranium for use by U.S. utilities where it finds the domestic industry not to be viable, the Court of Appeals did not consider the relevance of U.S. international legal obligations.

<sup>9</sup> See 51 Fed. Reg. 27,132, 27,135-36 (1986), codified at 10 C.F.R. § 762.3 (1987).

## SUMMARY OF ARGUMENT

Article III, paragraph 4 of the GATT, which provides for national treatment of imports into participating countries, has been adopted as the law of the United States. The legislative history of Section 2201(v) of the Nuclear Materials Act reveals that Congress intended any restrictions to foreign ore enrichment thereunder to be applied only in a manner minimizing conflict with United States GATT obligations.

The decision below adopts a construction of the section that not only conflicts with its plain meaning and its legislative history, but fails to employ settled principles of statutory construction, where, as here, an existing international legal obligation of the United States is implicated. It therefore should be reversed.

## ARGUMENT

### I. THE GATT IS U.S. LAW; SUBSEQUENT STATUTES SHOULD BE CONSTRUED TO MINIMIZE CONFLICT

The GATT is a multilateral international agreement; the primary instrument governing the regulation of international trade. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 457 (1977) ("the General Agreement on Tariffs and Trade (GATT) . . . is followed by every major trading nation in the world. . ."). Canada, the United States, and about ninety other nations are parties.<sup>10</sup> The Protocol of Provisional Application of the

<sup>10</sup> In 1938, the United States entered into an executive agreement with Canada relating to reciprocal trade. 53 Stat. 2348, E.A.S. No. 149. This agreement extended most-favored-nation status to each country with respect to duties and "to all laws or regulations affecting the sale or use of imported goods within the country." (Article I). In 1947, the United States and Canada exchanged letters in which the countries agreed that the 1938 Agreement "shall be inoperative for such time as the United States of America

GATT was executed under Presidential Authority,<sup>11</sup> delegated under the Tariff Act of 1930, as amended.

The Nuclear Materials Act was enacted after the United States became a contracting party to the GATT. Although the law adopted later in time prevails when federal statutes and international agreements unavoidably conflict, *see* Restatement § 135, reporter's note 1, it is just as well established that wherever possible, subsequent federal statutes should be construed in harmony with existing international agreements. *See Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); Restatement of the Foreign Relations Law of the United States (Revised) (Tent. Final Draft, 1985) § 134 and cases cited therein. Therefore, before finding that Congress has abrogated or modified an international agreement, this Court has required that Congress clearly express its intent to do so. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).

### II. CONGRESSIONAL INTENT TO MINIMIZE CONFLICT WITH THE GATT WHEN CONGRESS PASSED SECTION 2201(v) REQUIRES REVERSAL OF THE DECISION BELOW

Far from providing a clear expression of intent to abrogate or modify U.S. obligations under the GATT,

and Canada 'are both contracting parties to the [GATT]. . . ." 61 Stat. 3965, T.I.A.S. No. 1702. These letters are further evidence that the United States and Canada recognize the reciprocal obligations the GATT imposes.

<sup>11</sup> 61 Stat. pts. (5), (6), T.I.A.S. No. 1700 (1947). The GATT was adopted as U.S. law by Presidential Proclamation. Proclamation No. 2761A, 12 Fed. Reg. 8863 (1947). *See also United States v. Star Industries, Inc.*, 462 F.2d 557, 563 (C.C.P.A.), *cert. denied*, 409 U.S. 1076 (1972); Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 Mich. L. Rev. 249, 253 (1967). *See also* Restatement (Second) of the Foreign Relations Law of the United States §§ 143 and 144 (1965).



Congress was clear that § 2201(v) was to be read to minimize any potential conflict between possible future restrictions on foreign source uranium ore and U.S. GATT obligations. Article III, paragraph 4 contains the national treatment provision, one of the GATT's central elements. It states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Article III, paragraph 4 is quite broad and applies to all regulations that *affect* the sale of a product whether, directly or indirectly. Thus, even though the government provides a service, if the effect of a services limitation is to limit the sale of imported products, Article III, paragraph 4 would be contravened. In short, the GATT is concerned with effect, not method.<sup>12</sup> An embargo on enriching foreign uranium at U.S. facilities would similarly affect the sale of foreign uranium in violation of the GATT.<sup>13</sup>

<sup>12</sup> See, e.g., GATT Report, United Kingdom Complaint on Italian Discrimination Against Imported Agricultural Machinery, GATT Doc. L/833, 7th Supp. B.I.S.D. 60 (1958) (credit facilities should be provided to purchasers of Italian-manufactured agricultural machinery, whatever the machinery's origin).

<sup>13</sup> The six Western states, in their amicus brief opposing certiorari, suggest that Section 2201(v) is not within the GATT because any limitation of enrichment would be a condition of providing a service. Brief for Amici Curiae States in Opposition to Petition for Certiorari at 17 n.40 ("Brief for Amici"). This view ignores the clear contrary intent of Article III, paragraph 4.

Moreover, whatever the present views of certain U.S. trade officials, the legislative history is clear that Section 2201(v) was

Specific concern was raised by Congressional sponsors of the bill about the consistency of possible enrichment limitations for foreign uranium and the national treatment standard of Article III. AEC Chairman Glenn T. Seaborg specifically urged the State Department to address the issue. In a letter to Seaborg on June 8, 1964, Deputy Undersecretary of State U. Alexis Johnson expressed the U.S. Department of State view that:

discriminatory limitations on the domestic use of enriched foreign ore would be in direct conflict with either or both of this Government's long-standing policy of promoting the reduction or elimination of existing trade barriers and the avoidance of new restrictions and its international commitments under the General Agreement on Tariffs and Trade (GATT). . . . [Notwithstanding, we] . . . appreciate that the Commission's proposal, under which foreign ore would not be toll enriched for domestic use during the period 1969 to 1975, is transitional in nature within the framework of a significant gradual liberalization of AEC nuclear fuel supply practices . . . . [T]he Department does not object to the Commission's proposal on the understanding that the situation will be kept under continuing examination with a view to avoiding the imposition of restrictions or to relaxing any restrictions when and

passed by the Congress with the understanding that the purpose of the enrichment restriction was to restrict, in limited circumstances, the import of a GATT-covered product in a manner causing as little conflict with Article III as possible.

The six Western states also suggest, Brief for Amici at 17 n.41, that under Article XXI(b)(i) of the GATT, the U.S. is free to impose whatever restrictions it desires with respect to fissionable materials. The plain fact is that, in enacting the Nuclear Materials Act, the United States government never claimed that Article XXI applies to the enrichment at issue in the Nuclear Materials Act and it is doubtful that the government could do so given that enriched uranium is used commercially in the United States.



to the degree that this can be done consistent with the national interest.<sup>14</sup>

Shortly after the transmission of this letter, Joseph A. Greenwald, Director of the State Department's Office of International Trade, testified before the Legislation Subcommittee of the Joint Congressional Committee on Atomic Energy. Mr. Greenwald was asked by Joint Committee members, to whom the Johnson letter had been submitted, whether, under legislation which was to become Section 2201(v), the provision for limitations on the domestic use of enriched foreign ores, would "square with our international obligations." Hearings at 336 (Statement of Joseph A. Greenwald, State Dep't). Referring to the Johnson letter, Greenwald reiterated the basic conclusion that "discriminatory limitations on the domestic use of enriched foreign ores would be in direct conflict with our international commitments under GATT" (citing Article III, ¶ 4). Mr. Greenwald then continued with the observation that, nonetheless, he believed that the proposed legislation would be a mere technical violation of the GATT, if "done on a transitional basis" not inconsistent "with the [GATT] spirit as long as we made it clear we are trying to move to complete compliance with the GATT provision." Hearings at 337.

There is nothing in the legislative record to indicate that any member of Congress took issue with or rejected the conflict minimization objective put forward by Messrs. Johnson and Greenwald. On the contrary, the portion of the Joint Committee Report on the Nuclear Materials Act specifically discussing Section 2201(v) indicates that the Joint Committee accepted the Johnson-

<sup>14</sup> Private Ownership of Special Nuclear Materials, 1964: Hearings on H.R. 5035 and S. 1160 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 88th Cong., 2d Sess. 410-11 (1964) (hereinafter "Hearings") (Letter from U. Alexis Johnson to Glenn T. Seaborg (June 8, 1964)).

Greenwald understanding of the provision, i.e., that any restriction pursuant to it must be transitional toward full GATT compliance, and must be effected in a manner most consistent with U.S. trade obligations. It states:

the committee believes that these *reasonable and flexible* restrictions on the performance of [enrichment] services by the Commission should not in any sense be deemed inconsistent with any obligations the United States may have under the General Agreement on Tariffs and Trade (GATT) and other international trade agreements. (emphasis added).

S. Rep. No. 1325, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 3105, 3121 (1964).

The government of Canada strongly disagrees with the position that any restriction imposed pursuant to Section 2201(v) could be consistent with United States GATT obligations. A technical or transitional violation, though perhaps less egregious, is still a violation. The record, however, shows that this view was accepted by the Congress and that the Congress did expect enforcement in a manner that would minimize conflict.

The legislative history of the Nuclear Materials Act contrasts sharply with that found in, e.g., *Diggs v. Schultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). In *Diggs*, the "Byrd Amendment" to the Strategic and Critical Materials Stockpiling Act provided that "[n]otwithstanding any other provision of law," the President may not restrict importation of certain materials. *Id.* at 463. Appellees were licensed by the U.S. government to import materials contrary to a United Nations boycott. The license was challenged as contrary to U.S. treaty obligations. The court found that the intent of the Byrd Amendment "was to detach this country from the U.N. boycott . . . ." *Id.* at 466. The court noted that "[t]he legislative record shows that no

member of Congress voting on the measure was under any doubt about what was involved . . . it was . . . a measure which would make—and was intended to make—the United States a certain treaty violator.” *Id.* In stark contrast, the Joint Committee Report for the Nuclear Materials Act shows that Congress believed that its action was consistent with the GATT.

In applying these “reasonable and flexible” restrictions, DOE should, as it would, refuse to reimpose a futile embargo because such refusal ensures that the Nuclear Materials Act is not applied in a manner inconsistent with U.S. GATT obligations. That was the Congressional directive. Therefore, its refusal is not only supported by a plain reading of the statute (as the Petitioner and supporting amici have cogently demonstrated), but by the explanation of the section adumbrated by the Joint Committee Report and by sound principles of statutory construction. To deny DOE this authority is to read into the statute what is not there.

## CONCLUSION

The DOE has been following the mandate of Congress in Section 2201(v). Ignoring that mandate, the court below would force the DOE not only to violate the statute but also United States international obligations. The next chapter in the United States-Canada uranium story should be one of cooperation and mutual interest. That will not happen without this Court’s reaffirmation of Congressional intent.

Accordingly, the judgment of the Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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February 25, 1988

## **APPENDICES**



## APPENDIX A

Canadian Embassy  
Note No. 194

Ambassade du Canada

The Embassy of Canada presents its compliments to the Department of State and has the honour to refer to a decision of July 20, 1987, in the United States Court of Appeals for the Tenth Circuit to provide relief to the United States' domestic uranium industry based on Section 161 (V) of the Atomic Energy Act of 1954. The court has concluded that the previous decision of the United States District Court for the District of Colorado was correct with respect to the statutory obligation under Section 161 (V), and has affirmed that injunctive relief was appropriate by enjoining the Department of Energy to limit the enrichment of uranium of foreign origin destined for use within the United States. The result of this decision is that there is now in effect a complete ban on the enrichment of foreign uranium in the United States.

It is the view of the Government of Canada that the decision, should it remain in force, will severely disrupt Canadian exports of uranium to the United States, will have harmful implications for the international uranium market, and will give rise to major trade irritants between the United States and its current suppliers of uranium. In addition, restricting the United States market to only domestic uranium would be completely at odds with current efforts to negotiate a free-trade agreement between our two countries, contrary to declarations against protectionism made at Punta del Este, and clearly inconsistent with the United States' GATT obligations.

Canada will be the foreign supplier most adversely affected by this restriction. Canada is a reliable, fair and competitive supplier of uranium to many countries and is, by far, the largest foreign supplier to the United

States. One-third of Canadian uranium production is exported to meet the requirements of United States power utilities. These sales, which exceed \$200,000,000 in 1985, represent nearly 70 percent of total U.S. uranium imports.

It must be recognized that, to the extent United States utilities choose not to purchase enrichment services abroad, the affirmation of the lower court's decision represents a total embargo on imports of uranium from Canada. The Canadian government is very concerned to see the world's largest market for uranium once again protected by unilateral non-tariff [sic] barriers as it was during the period from 1967 to 1984.

The Government of Canada urges the Government of the United States to appeal this court decision so that unrestricted access for foreign uranium will be restored. If it is found that this decision cannot be appealed, the Government of Canada would urge that all legislative and administrative avenues be actively explored to effect the elimination, or at least the significant reduction, of this unilateral import restriction.

The Embassy of Canada takes this opportunity to renew to the Department of State the assurances of its highest consideration.

[Signed and Sealed  
with Embassy seal]

July 22, 1987  
Washington, D.C.

## APPENDIX B

Canadian Embassy  
Note no. 359

Ambassade du Canada

The Canadian Embassy presents its compliments to the Department of State and has the honour to refer to the October 13th proposal announced by the United States Atomic Energy Commission for the retention of its prohibition against the domestic enrichment of imported uranium for consumption in the United States and for the disposal of its 50,000 ton stockpile of surplus natural uranium concentrates on domestic and foreign markets. The Government of Canada wishes to state its strong opposition to such a policy.

The Canadian Government has made repeated representations to the United States Government with respect to its restriction on the domestic utilization of imported uranium. The Canadian Government has pointed out that this restriction has a very serious depressing effect on the Canadian Uranium Industry and is seriously jeopardizing its future prospects. The Canadian Government has also pointed out that the restriction conflicts with United States' obligations and Canadian rights under the GATT, and has requested that the United States Government undertake to remove the restriction by a specified early date.

Notwithstanding these representations and repeated assurances from the United States Government that the restriction was temporary, including indications that a phased removal program would begin before the middle of the decade, the United States Atomic Energy Commission proposed on October 13th to take no action toward lifting this restriction until the United States Mining and Milling Industry was in a stronger growth position. When such a growth position was achieved, perhaps around the end of the decade, a partial removal of the

restriction would be considered. The Canadian Government views this proposal with great concern. The Canadian industry is operating far under capacity—a capacity in large part initially developed in response to United States requirements for uranium. The present depressed state of the Canadian industry is mainly attributable to the United States' restriction which has precluded Canadian competition for contracts to supply the United States' civil nuclear market. The future prospects of the Canadian Uranium Industry, including its ability to supply anticipated long term demand for uranium in the United States, would be seriously jeopardized by the maintenance of the restriction.

The Canadian Government is also seriously concerned about the Commission's proposal for the disposal of 50,000 tons of surplus uranium concentrate on domestic and foreign markets, particularly in view of the large stockpiles held by several other countries including Canada. In particular, in contrast to the detailed provisions in the Commission's proposal to safeguard the viability of the domestic industry, the proposal makes no explicit provisions designed to avoid disruption, in markets outside the United States, which could have severe adverse consequences for the viability of Canadian uranium producers. While no indication is given of the magnitude of possible sales outside the United States, the illustrative schedule for domestic disposals allows for annual disposal levels of up to 7,500 tons for some years—almost double the current rate of Canadian production. Sales in foreign markets amounting to even a small proportion of this level could further aggravate the depressed state of Canadian uranium producers and seriously endanger their viability.

The Canadian Government requests therefore that the United States Government undertake to avoid disposal of stockpile material in any manner disruptive to normal commercial sales from Canadian producers, and to honour

its obligations under the GATT by announcing at the earliest possible date the lifting of its restriction on domestic utilization of imported uranium.

The Canadian Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

WASHINGTON, D.C.

December 3, 1971

[Signed and Sealed  
with Embassy Seal]



No. 87-645

Supreme Court, U.S.

FILED

MAR 30 1988

JOSEPH F. SPANGL, JR.  
CLERK

In The  
**Supreme Court of the United States**

October Term, 1987

— o —  
F. CLARK HUFFMAN, *et al.*,  
*Petitioners,*  
v.

WESTERN NUCLEAR, INC., *et al.*,  
*Respondents.*  
— o —

On Writ of Certiorari to the  
United States Court of Appeals  
For the Tenth Circuit

— o —  
**BRIEF OF AMICI CURIAE STATES  
IN SUPPORT OF RESPONDENTS**  
— o —

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## QUESTION PRESENTED

The domestic uranium industry is not viable. Section 161(v) of the Atomic Energy Act of 1954 (42 U.S.C. 2201(v)) mandates that the Department of Energy (DOE), "to the extent necessary to assure the maintenance of a viable domestic uranium industry," *shall not* provide enrichment services for foreign-source uranium intended for domestic use. All parties agree that the purpose of Section 161(v) is to preserve and maintain a viable domestic uranium industry. All parties agree that DOE refused to impose restrictions on the enrichment of foreign uranium during the domestic industry's decline or subsequent to the time it became non-viable. DOE contends that the statute absolves it from the duty to impose restrictions if, in DOE's opinion, such restrictions would not restore the industry's viability.

The question is whether Section 161(v) requires DOE to restrict the enrichment of foreign uranium for domestic use when the domestic uranium industry is not viable.



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On Writ of Certiorari to the  
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For the Tenth Circuit

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**BRIEF OF AMICI CURIAE STATES  
IN SUPPORT OF RESPONDENTS**

---

**STATEMENT OF THE INTEREST OF  
THE AMICI CURIAE STATES**

This brief is filed on behalf of the States of Arizona, Colorado, New Mexico, Nevada, Utah and Wyoming, and is sponsored by the Attorney General of Wyoming, as authorized by Supreme Court Rule 36.4. The Amici support the brief submitted by the Respondents and urge this Court to affirm the decision of the Court of Appeals for the Tenth Circuit.

Uranium ore has been mined and processed in each of the Amici Curiae States. Thus each State has a stake in

the economic viability of the domestic uranium industry. DOE's continued refusal to impose restrictions upon the enrichment of foreign-source uranium for domestic end-use so as to maintain the viability of the domestic uranium industry as required by Section 161(v) of the Atomic Energy Act is causing, and will continue to cause, serious harm to the economies of the Amici States, to the economies of local communities within these States, and to the citizens of these States.

## **I. HISTORICAL, FACTUAL AND PROCEDURAL STATEMENT**

### **A. Governmental Involvement in the Nuclear Fuel Cycle**

Naturally occurring uranium comprises two isotopes of that element: U235 and U238. U235 is the fissionable isotope, but it constitutes less than one percent of naturally occurring uranium. In order for uranium to be utilized as reactor fuel, the uranium must be enriched so that it is in the range of three percent to four percent U235. Historically, the Department of Energy (DOE) was the only provider of enrichment services in the free world; now the DOE is the only domestic supplier of enrichment services.

After World War II, the government initiated steps to develop the Nation's uranium resources both for defense and for peaceful domestic purposes. Because uranium and other nuclear material could be enriched and incorporated into weapons, the uncontrolled movement or

ownership of such material was perceived as a potential danger. In response to that perception, Congress provided that the government was to be the sole owner of such substances; consequently, uranium ore was mined and processed by private industrial concerns only under contract with the government.

Following that initial period of governmental ownership of nuclear material, Congress was persuaded that its earlier abundance of caution was unwarranted and amended the Atomic Energy Act in 1964 to allow private ownership of such material under license.

At the same time as private ownership became legally permissible, Section 161(v) was added to the Act. For several years thereafter, the Atomic Energy Commission (AEC), DOE's predecessor, imposed a total ban on the enrichment of foreign-source uranium for domestic end-use. Beginning in 1977, however, that ban was phased out, so that as of January 1, 1984, restrictions were completely eliminated.

During the period when enrichment restrictions were being phased out, foreign deposits of uranium ore were being developed. Meanwhile, demand for uranium increased less dramatically than DOE had forecast when it recommended phasing out the restrictions. Based in part upon DOE's erroneous projections of skyrocketing demand, world production soon exceeded the lower than expected world demand, and uranium prices plummeted from \$40.00 per pound to current levels of less than \$18.00 per pound. At these low prices, which when adjusted for inflation are less than the government supported prices prior to 1964, most of the domestic mines and mills closed. Cheap



imports of subsidized foreign uranium have increased, and have captured an increasing percentage of U.S. market share even as demand is increasing.<sup>1</sup> The proportion of foreign uranium being enriched by DOE for domestic use has been steadily increasing, from 7.2% in the 1977-1981 period to more than 50% in 1982. DOE projects that imports will rise to nearly 65% of domestic requirements 10 years hence in 1998. (See Letter of Nov. 27, 1981, n.2, *infra*; and DOE's 1986 Viability Assessment, Table 23 (DOE/EIA-0477(86))

The domestic uranium industry began experiencing a downturn between 1979 and 1981. (Pet. Brief, 6-8.) Since then, the industry has further declined to the point that it is no longer viable. (*Id.* 10-11.) During the period of decline, Respondents perceived that the viability of the industry was threatened and requested DOE to reimpose restrictions in order to maintain the viability of the industry. DOE cast aside those requests by asserting that the industry was still viable. DOE's response to industry concerns completely ignored the apprehensions Respondents

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<sup>1</sup>Domestic nuclear power plants consumed seven million pounds of uranium in 1970, 18.3 million pounds in 1975, 20.7 million pounds in 1980 and 25.8 million pounds in 1985. (See Affidavit of George White, Jr., Chairman of NUEXCO, Attachment 2 to Res. Motion for Summary Judgment.) DOE cites domestic utility requirements to have been 24.7 million pounds in 1980 and 34 million pounds in 1985 (DOE 1986 Viability Assessment, *infra*). Once the infrastructure of U.S. mines and mills has been abandoned and expertise has been dispersed, it will take years to revive a productive industry. Subsidized foreign producers can expect a lucrative payoff once domestic production has been displaced.

expressed about the future viability of the industry.<sup>2</sup> Finally, after experiencing three years of frustration because of DOE's refusals to act, Respondents initiated this case on December 7, 1984.

## B. Economic History of the Amici Curiae States

It is well known that the economic history of the West has been one of exploitation, punctuated with periods of boom and bust. Early economic endeavors did not always bring long-term growth and economic stability.

The early fur brigades virtually exterminated the beaver from the mountain streams during the 1820's and 1830's. The hunters of the 1860's and 1870's did the same to the buffalo on the plains. Ranchers and farmers West of the 100th meridian tried to force more from the land than it could give. Timber barons used short-sighted methods in harvesting the riches from the forests.

Early mineral development brought about similar wide swings in economic activity. The Western region enjoyed spectacular economic growth following gold discoveries, and was later left with unspectacular ghost towns. Silver development ended with even more drastic results when the government withdrew its support for the silver market after 1893.

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<sup>2</sup>See correspondence attached as exhibits to the Complaint, particularly: Letter of Oct. 12, 1981 from Donald O. Rausch, President of Western Nuclear, Inc. to Shelby T. Brewer, Assistant Secretary for Nuclear Energy; Response of Nov. 27, 1981 from Mr. Brewer to Mr. Rausch; Letter of Nov. 12, 1981, from Mr. Rausch to William R. Voigt, Director, Office of Uranium Enrichment and Assessment; and response of Dec. 28, 1981 from Mr. Voigt to Mr. Rausch.

At the end of the 19th and the beginning of the 20th Century these Western territories achieved statehood. These states began providing services, levying taxes and sending their representatives to Washington. As a result of the amplitudes of prior economic cycles, concern had grown as to the wisdom of uncontrolled economic development. This concern led to an expanded role for state and national government.

It was in this historical context that Western representatives urged adoption of Section 161(v). This Section was designed to protect the domestic uranium industry from ruinous foreign competition and to protect the Amici States from the boom and bust cycle of mineral development.

When Section 161(v) was adopted, the domestic uranium industry had been developing for over fifteen years under the umbrella of the government's captive market, and Congress intended to maintain the industry's health. That intent, if carried out, would in turn assure the States that they would not have the financial and environmental burdens relating to an unexpected collapse of the industry.

Thus, the States believed they could plan and act to support the industry in anticipation of a stable economic future. The States could provide funds for building needed schools and roads and other segments of the infrastructure necessary to provide public services to mining and milling companies, their employees and their suppliers. Workers' compensation insurance rates could be set to provide funds to aid injured miners and other injured industry employees. Unemployment tax rates could be set to provide help to those facing temporary periods of un-

employment. Funds could be budgeted and policies and procedures could be set up to assure that a healthy uranium industry would coexist with a healthy environment. It was anticipated that such funds would be provided, in part, by taxes on a healthy, viable domestic industry whose employment rolls would remain stable.

The States have been disappointed. DOE has ignored Section 161(v) of the Atomic Energy Act and the States are suffering another economic bust. Although the effects are scattered and vary from State to State and from place to place within the affected States, the experience has been traumatic. For example, Wyoming's workers' compensation fund is severely depleted, and the experience in some localities has been disastrous.

In Fremont County, Wyoming, the home of Jeffrey City, the historical center of Respondent Western Nuclear's operations, which is fast becoming a modern ghost town, the statistics illustrate a dismal story. Between December, 1978 and December 1987, total State employment fell by 2.1%, and Fremont County employment fell by 19.3%. The unemployment rate for the State went from approximately 3.5% to 7.6%, while the unemployment rate for Fremont County rose from 3.6% to 9.3%. State mining employment fell by 9.5% and Fremont County mining employment fell by 62.4% between 1979 and 1984. Between 1978 and 1986 severance tax collections on uranium fell from \$3.6 million to \$991,000.00 in the State and from \$1.7 million to \$0 in the County. (Appendix)

The decline in the uranium industry has devastated Fremont County's general economy. Between the fall terms of 1978 and 1987, school enrollment dropped 9.4%

county-wide and by 82.8% in the Jeffrey City area, leaving vacant and under-utilized school facilities as continuing burdens. Between 1978 and 1986 the assessed value of property throughout the State of Wyoming (for real estate tax purposes) increased by 136.4%, generally in line with inflation. The assessed values in Fremont County, however, increased by only 70.0%. Between 1978 and 1986 retail sales tax collections increased by 68.1% State-wide, but only by 23.3% in Fremont County. Even more telling for the 1981-1986 period is a 67.6% decrease in Fremont County use tax collections compared to a State-wide increase of 18.9%.<sup>3</sup> (*Id.*)

### C. History of Section 161(v) under DOE and AEC

Historically the AEC and DOE have always adhered to the concept that Section 161(v) is mandatory. Beginning in 1964 the AEC imposed a total ban on enrichment of imported uranium for domestic use. In 1974, during the hearings relating to the gradual relaxation of restrictions, AEC Commissioner Anders indicated that restrictions again would have to be imposed if the viability of the domestic industry were threatened:

Should there be any indication that the proposed schedule is endangering domestic industry viability, U.S. self-sufficiency, or our national security, the Commission will reimpose restrictions or take such other steps as might be appropriate. *Proposed Modi-*

<sup>3</sup>The experience in the other Amici States has been similar. Industry capital expenditures were \$14 million in 1985 compared to \$324 million in 1981. Employment dropped to 2400 person years in 1985 from 13,700 person years in 1981. Domestic uranium production was at its lowest level since the mid-1950's. DOE's 1985 Viability Assessment, Table 11 (DOE/EIA-0477(85))

*fications of Restrictions on Enrichment of Foreign Uranium for Domestic Use: Hearings Before the Joint Committee on Atomic Energy, 93rd Cong., 2d Sess. 6 (1974) (Testimony of Wm. A. Anders, Commissioner AEC).*

The foregoing statement of Commissioner Anders was not isolated: he was reiterating the general theme of earlier Joint Committee Hearings.<sup>4</sup>

When, in 1981, Respondent Western Nuclear notified DOE of its concerns about the danger to domestic viability caused by DOE's enrichment of an increased percentage of foreign uranium, Assistant Secretary Brewer reaffirmed that DOE was required to reimpose restrictions when the industry became adversely affected by imports:

DOE's surveys provide no demonstrable evidence that foreign-origin uranium *has* adversely impacted the domestic industry, a conclusion which you apparently do not dispute. Accordingly, there is no need at this time to revise the existing regulatory scheme. However, *as required by the statute, DOE will continue to monitor the situation and will revise the restrictions on the enrichment of foreign-origin uranium if the need arises.* (Emphasis added.) (Letter of November 27, 1981, n.2, *supra.*)

One can only conclude that between 1964 and 1981 DOE had not changed its opinion that Section 161(v) was mandatory. For those 17 years, the agency charged with administering the statute interpreted it to require restric-

<sup>4</sup>See Private Ownership of Special Nuclear Materials, Hearings before the Legis. Subcomm. of the Jt. Comm. on Atomic Energy, 88th Cong., 1st Sess. 114-15 (1963); Private Ownership of Special Nuclear Materials, 1964, Hearings before the Legis. Subcomm. of the Jt. Comm. on Atomic Energy, 88th Cong., 2d Sess. 154 (1964).



tions upon any indication that domestic industry viability was endangered or adversely affected by imports.

In 1964, a complete ban was presumed necessary; by 1974, a controlled phaseout of restrictions (to commence in 1977) with continual monitoring was set in motion to test the validity of that assumption. With intervening years and a change of political climate in the executive branch favoring DOE's enrichment empire at the expense of the domestic uranium producers, DOE recently came to presume that restrictions were not necessary until adverse impacts were *actually* experienced. DOE's attitude became one whereby it decided that Section 161(v) restrictions were not to be imposed to "maintain" the viability of the industry, but rather to counteract harm only after it had occurred. Even with this change of emphasis in the early 1980's, there was no doubt that the statute was mandatory in its coverage.

When Respondents initiated this case, DOE took the position that no restrictions were appropriate while the industry remained viable. To support this view, in December, 1984, within weeks of the filing of this case, DOE published its finding that the industry was viable during 1983. DOE denied the allegations in the District Court Complaint that the industry was not viable and also denied that the industry's viability was threatened. It therefore also denied its obligation to impose restrictions. (Joint App. 13-14, 23-24.)

However, in September, 1985, nine months after finding that the industry was viable during 1983, DOE published its finding that the industry had suddenly changed and was not viable during 1984. (Pet. Brief 10.) Then, to

avoid its earlier recognized responsibilities under Section 161(v), DOE changed its interpretation of the statute. At first DOE claimed that it had discretion under Section 161(v) to choose not to impose enrichment restrictions. After this theory was rejected by the District Court, DOE unilaterally concluded that restrictions need not be imposed because the industry would not be helped.

Prior to September, 1985 (when DOE found that the industry had not been viable in 1984) the question presented was whether DOE was required to impose restrictions when confronted with persuasive evidence that the industry's viability was threatened. DOE refused to implement the mechanism required by Congress to preserve the viability of the industry.

DOE now asserts that the question presented is whether or not it should be required to impose restrictions when it has determined that restrictions would not, at this late date, restore the industry to viability. Unfortunately, DOE did not move to impose restrictions during the 1981-1984 period because it insisted that the need had not yet arisen; now, for purposes of this case, it asserts that the need is so great that restrictions will not solve the problem. DOE's history of failure to preserve the domestic industry as required by the statute is now being used as the justification for abandoning the industry and its statutory duty.

DOE was unable to persuade either the District Court or the Court of Appeals that its lack of action justified its continued failure to carry out the statutorily mandated mechanism of imposing restrictions to serve the statutory

purpose of maintaining and preserving the viability of the domestic uranium industry.

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## II. SUMMARY OF ARGUMENT

At the time Congress adopted Section 161(v) the domestic uranium industry had been maturing under the Government's protective umbrella for many years. Congress felt that the industry was of great importance to the Nation, and Congress was aware that private ownership of uranium would change the economic environment for the industry. For these reasons Congress concluded that the industry should be insulated from what might become ruinous foreign competition.

Thus, the goal or purpose of the statute was to preserve and maintain the industry's viability, and the mechanism Congress chose to accomplish that end was to require the AEC (now, DOE) to impose restrictions upon the enrichment of foreign uranium for domestic use. To assure that the viability of the industry would be maintained, Congress intended the statute to be a mandatory directive to DOE. This Congressional intent is reflected by the language used in the statute and the legislative history.

Moreover, the historical interpretation of the statute by the agency charged with administering it supports the view that the language of the statute is mandatory and that restrictions on enrichment of foreign uranium would be utilized to maintain a viable domestic industry. It is only recently that DOE has changed its interpretation of the

statute based upon its self-serving conclusion that, in its opinion, the statutory goal would not be served by imposing the very restrictions which the statute requires. DOE attempts to justify its change of position by asserting that, in its opinion, restrictions would not benefit the domestic industry. DOE must be rebuked in its attempt to substitute its judgment and its policy for the express policy and judgment of Congress.

The statute does not purport to protect the *utility* industry but it explicitly protects the *uranium* industry. The statute is not inconsistent with non-treaty trade agreements, but even if it were, the statute controls. DOE does not have the legal authority to choose a statutory interpretation which it believes will support its enrichment enterprises, the utility industry and foreign interests at the expense of the uranium industry and the States. DOE has only the statutory authority given it by Congress.

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## III. ARGUMENT

### A. The Rulings Below Were Legally Sound and Should be Affirmed

This case involves a straightforward question of statutory interpretation. The ruling below by the District Court and affirmed by the Court of Appeals for the Tenth Circuit is a correct interpretation of the plain meaning of the statute and is supported by both its legislative history and DOE's historical interpretation.

## 1. Plain Meaning of the Statute

The court below reiterated the long-standing rule of statutory construction that the starting point for interpreting a statute is the language of the statute itself. When the terms of a statute are unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances. (citations omitted, Pet. App. 15a, Pet. for Cert.)

“Shall” when used in a statute is ordinarily construed to be mandatory language. See *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) and *Board of Pardons v. Allen*, (Case No. 86-461) 482 U.S. —, 107 S.Ct. 2415, 2420 (1987). Section 161(v) speaks in such mandatory terms. The Statute mandates that DOE *shall not offer* enrichment services for foreign-source uranium for domestic use. Congress directed DOE to preserve and maintain the viability of the domestic uranium industry and mandated the mechanism to be utilized.

The Petitioner relies upon the case of *Young v. Community Nutrition Institute*, 467 U.S. 974 (1986) to contend that mandatory statutory language can be ambiguous when examined in conjunction with the legislative history and the historical agency interpretation of the statute. In *Young*, however, the statutory purpose of protection of public health had already been achieved and was in no danger of not being maintained or preserved. In this case, the statutory objective has been abandoned by DOE. The domestic uranium industry is no longer viable. An equivalent fact situation in *Young* would have presented the Court with a situation where there was not only an imminent danger to the public health, but a situation where

people were dead and dying. Could an agency then successfully argue that it need not take action because such action would not raise the dead?

The Court of Appeals correctly concluded in this case that “the DOE proposes to abandon the statutory goal” and ruled that:

The unambiguous language of the statute requires the DOE to refuse enrichment of foreign uranium “to the extent necessary to assure” a viable domestic industry. The DOE may determine how much restriction is required to ensure viability, but it cannot decide not to impose restrictions when the industry is not viable. (Pet. App. *infra* at 18a.)

## 2. Legislative History

The legislative record is replete with support for the statutory interpretation advanced by Respondents. Much of that has been quoted elsewhere. Of particular illustrative value from the viewpoint of the Amici States are floor debate statements by two Western Congressmen. Section 161(v) was enacted, in large part, to protect the domestic industry from ruinous foreign competition and to provide industry stability. Mr. Aspinall of Colorado urged passage of Section 161(v) with some of the following comments:

This legislation has been carefully drawn so as to minimize any possible economic dislocations.

In particular, this bill will have an important effect on the domestic uranium industry.

Today, after 10 years of intensive exploration, the United States has been converted from a have-not Nation in terms of developed uranium reserves to the point where we have some of the largest uranium re-



serves in the world. We have, in the process, created a substantial uranium mining and milling industry. (110 *Cong.Rec.* Part 15, 20144 (daily ed., Aug. 18, 1964.))

After noting that by 1964 the government and U.S. taxpayers had developed a thriving and viable domestic industry, Congressman Aspinall observed that such investment would be protected under Section 161(v):

Moreover this legislation, by providing a flexible restriction on the enrichment of foreign uranium, will protect our industry from possibly ruinous competition.

The maintenance of a viable domestic uranium mining and milling industry is an essential part of a sound nuclear industry and is also vital to the long-range defense and security interests of the United States. *Id.* 20145

Congressman Morris of New Mexico spoke in favor of the legislation "as a Representative of one of the major uranium producing States" and expressed his pleasure "that the committee has taken special care to provide protection to our domestic uranium producers against the competition of cheap foreign uranium." Mr. Morris further observed that:

The flexible restriction on the enrichment of foreign uranium contained in this bill will protect our industry against ruinous competition from cheap foreign uranium. Our uranium industry is a vital link in the national defense and security. It has been built and nurtured by vast Government expenditures. The Joint Committee had the foresight to protect our investment in this industry during a possible period of limited demand for uranium. (*Id.*)

Both the Joint Committee and Western Representatives understood that a viable domestic industry existed

in 1964 and had been funded by vast governmental expenditures. The goal of Congress in 1964, as embodied in Section 161(v), was not to achieve a viable domestic industry but to preserve and maintain a viable domestic industry which already existed. To this end, the DOE was charged with imposing restrictions, to the extent necessary, to protect the domestic industry against ruinous competition from cheap foreign uranium.

Cheap foreign uranium has flooded the domestic market in increasing volume in recent years and has been projected to capture well over half the market share. Congress intended that this should not occur and adopted Section 161(v) to prevent it. "If a court, employing traditional tools of statutory construction, ascertain that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

### 3. Agency Interpretation

Even though the plain meaning of the statute supported by its legislative history should be dispositive of the statutory interpretation question, Petitioner has urged this Court to adopt DOE's present interpretation of the subject statute.

The long-standing agency interpretation has been that restrictions are mandatory. It was only when the industry's non-viability could no longer be denied by DOE (September, 1985) that DOE changed the nature of its defense to Respondent's case. Rather than deny that the industry was non-viable and thereby deny that restric-

tions on enrichment of foreign uranium were then mandated, as it did at the outset of this case, DOE simply stated that it need not act to impose restrictions because they would not serve the statutory goal. DOE is violating the law by refusing to act as Congress directed and is grasping for justification. This Court has recently condemned such attempted agency lawmaking contrary to the will of Congress. *Louisiana Public Service v. F.C.C.*, 476 U.S. 355, 373-75 (1986).

The Petitioner again relies heavily upon *Young v. Community Nutrition Institute*, *supra*, in support of its assertion that agency interpretation should be given deference. However, the FDA's position in *Young* was conceded to have been long-standing and consistent with the controlling statute. DOE's position in this case is recently developed and contradicts its historical position and the statute. In *Young* the FDA responded to the problem in furtherance of the statutory goal. Here, DOE has refused to do anything at all.

If the statute were otherwise ambiguous and the legislative history not dispositive, this Court would be required to grant deference to long-standing agency interpretation of a statute it administers. However, the courts have never held that an agency, absent Congressionally delegated discretion, can change the law by changing its interpretation of the statute simply because the agency believes the statute has become inappropriate to the times.

DOE should be held to its long-standing interpretation of the statute that restrictions on the enrichment of foreign source uranium are mandatory.

## **B. Protection of the Interests and Expectations of the Amici Curiae States**

As a result of DOE's failure to impose statutory restrictions in order to preserve and maintain the viability of the industry, the industry, the Amici States, the local communities of the Amici States, and the citizens of the Amici States have suffered and will continue to suffer with the burdens of over-built public facilities, reduced tax revenues and increased unemployment.

The Amici States were entitled to feel secure from the risks of another boom and bust cycle. The States were entitled to provide the infrastructure and other public services related to serving a viable industry with the expectation that the statutory commitment would be met. The States were entitled to plan for environmental safeguards with the expectation that the national government's commitment to the viability of the industry would enable the industry to provide those safeguards. The States were entitled to commit to other social and public services for their citizens with the expectation that a viable industry would help provide the means to meet those commitments.

The restoration of viability to the industry will serve, at least partially, to vindicate the rights and expectations of these States, and such a result is not as remote as the government argues. This country is the largest market for uranium in the free world, and its demand and consumption continue to grow. See, Brief of the Government of Australia, p. 2; Brief of Electric Utility Companies, pp. 5-6; Brief of Eldorado Nuclear Limited, *et al.*, p. 2; Figures 4 and 5, 1985 Viability Assessment, *supra*. If a meaningful portion of the tens of millions of pounds of foreign

uranium now expected to be consumed domestically in the next several years were to come from the domestic industry, the market price of domestic uranium would increase and the domestic industry would be helped. (Pet.Brief, 34.)

### C. Response to Amici Utilities

The thrust of the Amici Utilities' argument is: that the statute grants DOE wide discretion as to whether or not to impose restrictions; that restrictions would not restore viability to the uranium industry and would harm the utility industry; that the DOE applied its discretion reasonably in deciding against imposing restrictions because DOE properly balanced the interests of the uranium industry against the interests of DOE and the utility industry; that Congress impliedly ratified the existence of DOE's discretion by adopting Section 170B, 42 U.S.C. 2210b, rather than a specific import restriction; and that the judicial branch must not interfere with administrative prerogatives.

The utilities' chain of logic is without a single sound link.

There is no disagreement that the statutory goal of Section 161(v) was the preservation and maintenance of a viable domestic uranium industry after private ownership became permissible. Congress provided the mechanism which DOE was to utilize to assure that goal: DOE *shall* impose restrictions on the enrichment of foreign uranium for domestic use. By plain meaning, legislative history, and historical administrative interpretation, the statute is not discretionary as suggested by the utilities.

The claim that restrictions would impose difficulties on the utility industry but not restore viability to the uranium industry is unsupported, self-serving, and irrelevant. The utilities do not deny that restrictions will cause an increase in demand for domestic uranium (Amici Brief of Utilities, 6-7) which should, under elementary economic theory, result in a higher price, and restore viability to the domestic uranium industry.<sup>5</sup>

Had Section 161(v) not been in existence, DOE's favoring of the utility industry's interest over the uranium industry's interest might have had some justification, but Congress has spoken and Section 161(v) does exist:

First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron, U.S.A. v. Natural Resources Defense Council, supra*, at 467 U.S. 842-3.

Congress has expressed its intent: DOE is to act to preserve and maintain the viability of the domestic industry by imposing restrictions upon enrichment of foreign uranium for domestic use. DOE is not free to advance the interests of its enrichment customers over

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<sup>5</sup>The utilities filed an affidavit in the Court of Appeals for the Tenth Circuit in support of DOE's request for stay pending appeal of the District Court's order. Mr. Steyn estimated that the price for domestic uranium would rise to \$35 per pound and higher if the District Court's order took effect and restrictions were imposed on the enrichment of foreign-source uranium. He further stated that domestic production would have to double to replace foreign uranium. (See Affidavit of Julian J. Steyn dated July 3, 1986, attached to Joinder of Amici Curiae in Motion for Stay Pending Appeal filed July 16, 1986.)



the interests of the uranium industry. DOE does not have the right in this case to take on the job of reconciling different policies. The reconciliation decision was made by Congress in 1964 and affirmed by Congress in 1982 when Congress adopted Section 170B, which provided additional (not to be confused with substitute) mechanisms for preserving the viability of the uranium industry.

By ordering DOE to impose restrictions, the District Court below did not usurp DOE's prerogatives. Instead, the District Court interpreted the statute and utilized its inherent equitable powers to formulate a reasonable remedy. Since 1981, DOE had totally ignored its Section 161(v) responsibilities. The Court ordered temporary restrictions only until DOE, through the exercise of its rule-making authority, implemented its responsibilities. Rather than substituting its judgment for that of DOE, the District Court ordered DOE to conform its behavior and to exercise its authority in a manner consistent with the statute. The appropriateness of the District Court's Order is supported by the fact that DOE has yet to take one step toward implementing its authority consistent with its statutory duty. Nearly seven years have passed since it became evident that imports threatened industry viability and Respondents requested DOE to implement Section 161(v).

#### **D. Response to Foreign Amici Interests**

The importance of market share in the world's largest market for uranium, and the economic benefits to be derived therefrom, are underscored by Amici Briefs filed by the Government of Canada, Provinces of Canada, ura-

nium companies located in Canada, and the Government of Australia. It is obvious that the foreign amici position is one founded on the proposition that implementation of Section 161(v) will harm their economic interests and benefit U.S. uranium producers and the states from which such production emanates. It should also be obvious that Congress intended exactly such a result in 1964 when it amended the Atomic Energy Act to include Section 161(v).

Canada, Australia, and Canada's uranium industry have made the assertion (which is similar to that of the Amici States) that they have made substantial investments, based in part on a reasonable expectation of continued access to the United States market. It is further asserted by Canada that the District Court's injunction unilaterally reverses United States trade policy toward Canada. Despite the fact that the mandatory statutory language of Section 161(v) has been on the books since 1964 (and foreign interests therefore were aware of U.S. law prior to making any investments) and despite the fact that courts do not "reverse" trade policy, the foreign amici attempt to drape their legal arguments in the fabric of an executive agreement: the General Agreement on Tariffs and Trade (GATT), (Oct. 30, 1947, 61 Stat. pts. 5, 6; P.I.A.S. No. 1700; 55 U.N.T.S. 61.)

Article XXI of the GATT specifically exempts uranium. Article XXI(b)(i) provides that nothing in the GATT shall be construed:

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived.

Australia argues that the U.S. Government has not claimed an exemption under Article XXI of the GATT, but neglects to point out that it is not required of the United States Government, pursuant to GATT, to claim such an exemption inasmuch as the exemption is already set forth in the GATT itself. In fact, the United States Government has made its position clearly known to this Court and has stated that: "We do not necessarily agree with all of the assertions in those briefs [Canada and Australia] about the United States' obligations under international agreements and international law". (Pet. Reply Mem. 6 n.3, Pet. for Cert.)

In any event, it is clear that foreign economic interests cannot prevail over the economic interests of states of the United States based upon an executive agreement which exempts fissionable material and which was superseded by the passage of a statute which would, in any event, control.<sup>6</sup>

The reliance of the Respondents and the Amici States on the plain meaning of Section 161(v) and the expectation that the DOE would maintain domestic industry viability by restricting enrichment of foreign source uranium should not fall victim to a purported "trade policy" between an administrative agency and foreign interests which negates explicit Congressional intent.<sup>7</sup>

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<sup>6</sup>See, generally, Henkin, *Foreign Affairs and the Constitution*, pp.164, 185-86, 413-14 (1972) for discussion and explanation that a statute passed later in time controls over earlier executive agreement. See, also, *Restatement of Foreign Relations Law of the U.S.* (revised) (tent.final draft 1985 § 135(1)(a)).

<sup>7</sup>Appendix C to the Amici Brief of Eldorado Nuclear Limited, et al. sets forth excerpts from the proposed Canada-US Free-

(Continued on following page)

## CONCLUSION

DOE's argument that Congressionally mandated policy is not wise in the present uranium market should be made to Congress and not to the courts. The Decision and Order of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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*On behalf of the Amici Curiae  
States of Arizona, Colorado,  
New Mexico, Nevada, Utah  
and Wyoming*

March, 1988

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(Continued from previous page)

Trade Agreement which has been submitted to Congress. And Congress, not DOE, is the proper forum for a policy decision on whether or not Section 161(v) should be amended to exempt Canada from restrictions on enrichment of its uranium intended for U.S. end-use.

**APPENDIX**

**VERIFIED STATEMENT OF  
ANNE W. McGOWAN**

I, Anne W. McGowan, being first duly sworn and put upon my oath do state:

1. I am the manager of information and research for the Economic Development and Stabilization Board for the State of Wyoming.

2. In that capacity, I am responsible for gathering, maintaining, summarizing and otherwise dealing with information and statistical data relating to the various components of Wyoming's economy, and the economics of its political subdivisions.

3. I have reviewed much of the information and statistical data available to the Board and available to me in my official capacity, and the following table contains information about the uranium mining and milling industry and its relationship to the general economy as it existed in the State of Wyoming for the years described.

/s/ Anne W. McGowan  
ANNE W. McGOWAN

Sworn to before me  
on March 15, 1988

/s/ Donna Witters  
Notary Public



## URANIUM INDUSTRY COMPARATIVE STATISTICS

EMPLOYMENT	DEC. 1978	DEC. 1987	INCREASE (DECREASE)
Statewide Employment	215,326	210,863	( 2.1%)
Fremont County Employment	16,877	13,612	( 19.3%)
State Unemployment Rate	3.5%	7.6%	
Fremont County Unemployment Rate	3.6%	9.3%	
	<u>1979</u>	<u>1984</u>	
State mining employment	33,570	30,386	( 9.5%)
Fremont County mining employment	3,993	1,503	( 62.4%)
URANIUM SEVERANCE TAX COLLECTIONS	<u>1978</u>	<u>1986</u>	
Statewide Sev. Tax Collections	\$3.6 mil.	\$991,000	( 72.5%)
Fremont Cnty. Sev. Tax Collect.	\$1.7 mil.	\$ 0	(100.0%)
SCHOOL ENROLLMENT	<u>Fall 1978</u>	<u>Fall 1987</u>	
Fremont County	8,250	7,474	( 9.4%)
Jeffrey City area	540	93	( 82.8%)
REAL PROPERTY ASSESSMENT VALUES	<u>1978</u>	<u>1986</u>	
Statewide	\$3.3 bil.	\$7.8 bil.	136.4%
Fremont County	\$220 mil.	\$374 mil.	70.0%
TAX COLLECTIONS			
Retail sales tax—Statewide	\$47.3 mil.	\$79.5 mil.	68.1%
Retail sales tax— Fremont County	\$ 3.1 mil.	\$ 3.8 mil.	23.3%
	<u>1981</u>	<u>1986</u>	
Use tax—Statewide	\$37.5 mil.	\$44.6 mil.	18.9%
Use tax—Fremont County	\$1.39 mil.	\$0.45 mil.	( 67.6%)

No. 87-645

Supreme Court, U.S.

FILED

MAR 30 1988

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CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

F. CLARK HUFFMAN, *et al.*,  
*Petitioners,*

v.

WESTERN NUCLEAR, INC., *et al.*,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit

BRIEF FOR AMICI CURIAE  
UNITED STATES SENATORS JEFF BINGAMAN,  
PETE V. DOMENICI, JAKE GARN, ORRIN G. HATCH,  
ALAN K. SIMPSON, AND MALCOLM WALLOP  
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### **QUESTION PRESENTED**

Whether an agency may refuse to take action commanded by an Act of Congress where the agency determines that changed circumstances occurring since enactment of the statute would make compliance with the command of the statute unwise as a matter of policy.



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ALAN K. SIMPSON, AND MALCOLM WALLOP  
IN SUPPORT OF RESPONDENTS**

### INTEREST OF AMICI

Amici curiae are United States Senators who have an interest in presenting their views concerning the separation of powers between Congress and the Executive Branch, and file this brief pursuant to the Court's Rule 36 with the written consents of petitioners and respondents.<sup>1</sup> Amici believe that the position taken by petitioners in this litigation disregards the power of Congress to declare the nation's policy regarding the need to assure the viability of the domestic uranium industry, and hence support the position of respondents.

<sup>1</sup> The consents are on file with the Clerk of the Court.

### SUMMARY OF ARGUMENT

Petitioners' refusal to impose restrictions on the enrichment of foreign-source uranium pursuant to section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v), appears to rest in part upon a determination that a change in circumstances subsequent to Congressional passage of the statute has made the imposition of restrictions unwise as a policy matter. Such policy judgments are the province of Congress, not of an Executive Branch department. The proper course in such a situation is for the Executive to propose that Congress enact legislation to amend the statute.

Petitioners have also indicated that their refusal to impose enrichment restrictions pursuant to section 161(v) is the result of judgments concerning policies unconnected with the policy embodied in section 161(v) of assuring the viability of the domestic uranium industry. To the extent that the refusal rests upon such extraneous policy judgments, petitioners have acted beyond the authority granted to them by Congress. The decision of the Court of Appeals should accordingly be affirmed.

### ARGUMENT

#### TO THE EXTENT THAT THE AGENCY'S POSITION RESTS UPON A DISAGREEMENT WITH THE CONGRESSIONAL POLICY OBJECTIVES EMBODIED IN SECTION 161(v), THE AGENCY'S POSITION SHOULD BE REJECTED.

##### A. The Agency May Not Disregard an Act of Congress Based Upon its Assessment of Changed Circumstances.

Petitioners, the United States Department of Energy, *et al.* ("DOE"), appear to acknowledge that their position regarding the implementation of section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v), is inconsistent with the position taken previously by DOE's predecessor, the Atomic Energy Commission ("AEC"),

and by DOE itself until the District Court ruled against it in the instant litigation.<sup>2</sup> While the AEC was previously committed to impose restrictions on the enrichment of foreign-source uranium in the event that the viability of the domestic uranium mining and milling industry was threatened, DOE now takes the position that it will not impose enrichment restrictions even though DOE has determined that the industry is not viable.

Because the AEC had a monopoly position in the world enrichment market when section 161(v) was enacted in 1964, the imposition of restrictions on the enrichment of foreign uranium necessarily produced increased demand for domestic uranium and assured the viability of the domestic uranium industry. DOE is thus apparently willing to concede that, at the time the statute was enacted, Congress reasonably believed that the imposition of enrichment restrictions was a proper and effective means of assuring the viability of the domestic industry. *See* Pet. Br. at 31-33.

DOE argues that essentially different considerations are presented now that DOE has lost its enrichment monopoly. According to DOE, restrictions on the enrichment of foreign uranium would cause the price of DOE's enrichment services to rise, thereby driving "some of DOE's current customers to look elsewhere for enrichment services"; this, in turn, it is asserted, would decrease the demand for domestic uranium. Pet. Br. at 14-15. DOE has ostensibly concluded for such reasons that the imposition of restrictions would be unwise.

<sup>2</sup> Thus far, petitioners have not explained in this Court the prior inconsistent agency positions detailed in Respondents' Brief in Opposition at 2-3, 12. In the Court of Appeals, DOE stated that the prior inconsistent statements of the Atomic Energy Commission "date from an era when DOE had monopoly power in the uranium enrichment services market—and ought to be evaluated in the context of that very different situation." Court of Appeals Reply Brief at 3-4 n.2 (filed Sept. 4, 1986).



To the extent that DOE's refusal to impose enrichment restrictions rests upon a determination that a post-enactment change in circumstances renders it unwise to obey the command of section 161(v), the Court should make it unquestionably clear that it is the role of Congress, not the Executive, to make such policy judgments. DOE must obey the statute until it is amended. See *Public Citizen v. Young*, 831 F.2d 1108, 1122 (D.C. Cir. 1987), *pet. for cert. filed sub nom. Cosmetic, Toiletry and Fragrance Ass'n v. Public Citizen*, No. 87-1194 (Jan. 19, 1988) (where agency believes that application of statute in light of new scientific advances "produce[s] unexpected or undesirable consequences, the agency should come to [Congress] for relief"). Cf. *TVA v. Hill*, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought").<sup>3</sup> Courts—and agencies—may not, in the process of interpreting a statute, put aside "a particular course consciously selected by the Congress" on the basis of their own "appraisal of the wisdom or unwisdom" of the Congressionally-selected course. *Id.*

In this case, Congress is mindful of the agency's concerns regarding the effects of enrichment restrictions on DOE's enrichment enterprise, and is currently considering measures designed to assure the viability of the domestic industry and to address concerns about the soundness of DOE's enrichment enterprise. The Senate Committee on Energy and Natural Resources has reported

<sup>3</sup> See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker"); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 612 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is . . . entirely inadmissible").

favorably S. 1846, a measure that would abolish section 161(v) and create a system of charges to be paid by domestic utilities for their consumption of foreign uranium; the measure would also create a Government-owned corporation to take over DOE's enrichment enterprise. S. Rep. No. 214, 100th Cong., 1st Sess. (1987). The Committee's report recognizes that "a ban on DOE enrichment of foreign uranium, as mandated by the AEA upon a finding of non-viability, may not achieve the result originally intended . . ." *Id.* at 10. Nonetheless, as the foregoing discussion makes clear, DOE is *not* free on the basis of its own policy judgments to disregard section 161(v) pending action by Congress to amend the statute.

**B. The Agency May Not Refuse to Impose Restrictions for Reasons Unrelated to the Viability of the Domestic Uranium Industry.**

DOE has indicated that it opposes the imposition of restrictions on enrichment of foreign uranium for reasons unrelated to questions concerning the extent of restrictions that are necessary to assure the viability of the domestic uranium industry. In its 1986 rulemaking,<sup>4</sup> arguing in support of its decision not to impose enrichment restrictions, DOE stated: "Notwithstanding the link between the health of the enrichment program and the use of domestic uranium, DOE has a responsibility to maintain a healthy enrichment program which transcends economic considerations." 51 Fed. Reg. at 27,137. DOE stated that its enrichment "criteria"—*i.e.*, its re-

<sup>4</sup> DOE's reliance on the July 29, 1986 rulemaking as support for its interpretation of section 161(v) is precluded by Pub. L. 500, 99th Cong., § 305, 100 Stat. 1783-209 (1986), which provides that "no provision" of the July 1986 rules may be used to "affect the merits of the legal position of any of the parties" concerning the meaning of section 161(v) in the instant litigation.

fusal to impose restrictions—"must take into account DOE's dual role in running the enrichment program and consider the interaction of the enrichment program with governmental policies." *Id.* The "governmental policies" identified by DOE include nuclear non-proliferation and "relationships with our trading partners." *Id.*<sup>5</sup>

In enacting section 161(v), Congress simply did not give the agency the discretion to base decisions about enrichment restrictions on "transcendent" considerations of the health of DOE's enrichment business, or non-proliferation, or "free trade." The only relevant policy consideration enumerated in the statute is "the maintenance of a viable domestic uranium industry." Accordingly, DOE's position that other policies and considerations apply is contrary to the statutory scheme enacted by Congress. "An agency may not confer power upon itself" to act in a manner contrary to a Congressional limitation on its action. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

<sup>5</sup> The strength of DOE's views regarding the desirability of a free trade policy has been made especially apparent during consideration of S. 1846, the pending legislation discussed above. Arguing in opposition to a proposed provision that would establish trade restrictions for the protection of the domestic uranium industry as an alternative to the protections of section 161(v), the Secretary of Energy stated that "the imposition of such trade restrictions would be fundamentally inconsistent with this Administration's well established commitment to free trade and competition in the world market." S. Rep. No. 214, *supra*, at 95 (letter from Secretary Herrington to Chairman of Senate Committee on Energy and Natural Resources).

## CONCLUSION

DOE's position reflects a disagreement with the Congressional policy decisions embodied in section 161(v). Accordingly, the Court should reject DOE's position and affirm the decision of the Court of Appeals.

Respectfully submitted,

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March 1988

FOR ARGUMENT

No. 87-645

Supreme Court, U.S.

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On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

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**BRIEF FOR AMICUS CURIAE  
NATIONAL TAXPAYERS UNION**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

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No. 87-645

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F. CLARK HUFFMAN, *et al.*,  
*Petitioners,*

v.

WESTERN NUCLEAR, INC., *et al.*,  
*Respondents.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit**

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**BRIEF FOR AMICUS CURIAE  
NATIONAL TAXPAYERS UNION**

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This Brief is submitted on behalf of amicus curiae National Taxpayers Union ("NTU") pursuant to Supreme Court Rule 36.

**INTEREST OF AMICUS CURIAE NTU**

The ultimate question which petitioners Huffman, et al. (hereinafter referred to as the "Department of Energy" or DOE") and respondents Western Nuclear, Inc., et al., tender this Court on this appeal is whether, under § 161v. of the Atomic Energy Act ("AEA"), 42 U.S.C. 2201v., there must be limitations on the enrichment of



foreign-source uranium for domestic end-use. NTU<sup>1</sup> takes no position on this ultimate issue. However, resolution of this issue can have a profound and inextricable impact on an issue, also arising from § 161v. and also presented in the proceedings below, which is of overriding importance to NTU. This closely related question involves the requirement of AEA § 161v. that DOE recover all the costs of its civilian uranium enrichment program from its customers.

If DOE fails to recover the costs of its civilian enrichment program as provided in AEA § 161v., the burden of providing enrichment services (essential to produce nuclear fuel) will fall on U.S. taxpayers. The clear intent of the cost recovery requirement of § 161v. is to preclude any such taxpayer subsidy. Since the inception of the civilian enrichment program, DOE nevertheless has failed to recover at least \$8,800,000,000 (\$8.8 billion).<sup>2</sup> DOE now asserts authority to "write-off" any portion of that amount which it deems "appropriate."<sup>3</sup>

<sup>1</sup> NTU is a non-profit public interest organization with 150,000 members dedicated, inter alia, to eliminating unnecessary subsidies and fostering efficient administration of government services. NTU participated as an amicus curiae in the proceedings below and in the 1986 rulemaking on which Petitioners Huffman, et al., rely in their opening brief.

<sup>2</sup> Total "unrecovered costs" stood at approximately \$7.5 billion at the end of September, 1985. See 51 Fed. Reg. 3624 (Jan. 29, 1986) (DOE admission). The amount had grown to \$8.8 billion by early 1987. Statement of Keith Fultz (General Accounting Office) before Energy & Power Subcomm. of the House Energy and Commerce Comm., released April 8, 1987, entitled "The Future of DOE's Uranium Enrichment Program" at p. 1.

<sup>3</sup> One manifestation of this claimed authority is the agency's "utility services enrichment contract" ("USEC"), which the district court below invalidated on procedural grounds, with the court of appeals remanding for a determination on standing and for review of the substantive question whether the contract complies with the full cost recovery requirement of § 161v. The other manifestation

DOE has recently purported to "write-off" all but about \$3.4 billion of the total amount owed by the enrichment program to the Treasury as "unrecovered costs." Amicus NTU opposes the "write-off" as unlawful under § 161v. and as an unwarranted taxpayer subsidy contrary to the letter and intent of § 161v.

Some of the arguments employed by DOE to vindicate its position that it should not limit enrichment of foreign-source uranium for domestic end-use (as Western Nuclear, Inc., contend is required by AEA § 161v.) are the same as the arguments which the agency employs to support its position that it need not recover its costs as required by AEA § 161v. To the extent this Court addresses these arguments, litigation and policies relating to the full cost recovery provision of § 161v. will be affected.

## THE STATUTORY BASIS FOR THE ENRICHMENT PROGRAM

### A. AEA § 161v.

AEA § 161v. contains important substantive and procedural requirements governing the uranium enrichment program conducted by DOE. The two substantive requirements which the proceeding below has thus far involved are: (1) the requirement that DOE recover the costs of its civilian enrichment program in a reasonable period of time; and (2) the requirement that DOE limit enrichment of foreign-source uranium to the extent necessary to assure the maintenance of a viable domestic uranium industry.

The chief procedural requirement of AEA § 161v. involved in the proceedings below is that DOE operate its

of DOE's claimed authority not to recover costs is the agency's July 1986 "enrichment criteria," in which DOE professes to be able to balance cost recovery with other goals, and admits that it is "writing off" all but \$3.5 billion of past unrecovered costs.

civilian enrichment program in accordance with "written criteria," which criteria cannot be changed unless they have first been submitted for 45-days to the Joint Committee on Atomic Energy.<sup>4</sup> The congressional oversight and control which this requirement afforded<sup>5</sup> was largely eviscerated when the Joint Committee was abolished and

<sup>4</sup> In the litigation below, the district court found that DOE's new generic enrichment contract violated the "written criteria" requirement of AEA § 161v. in that, among other things, the "ceiling price" provided in the generic enrichment contract conflicted with the then-extant enrichment criteria from which such a provision "was deliberately deleted in 1973 because of concern that a ceiling price could preclude compliance with the statutory directive that the government must recover its costs over a reasonable period of time." *Western Nuclear v. Huffman*, D.Colo. 84-C-2315, Sept. 19, 1985, slip op. 3, citing *Proposed Changes in AEC Contract Arrangements for Uranium Enrichment Services, Hearing before the Energy Subcomm. of the Jt. Comm. on Atomic Energy*, 93d Cong., 1st Sess. 446 (1973). Under 42 U.S.C. § 7181(b)(3), DOE must now comply with rulemaking requirements in revising its enrichment criteria. DOE responded to the district court's order relating to the generic enrichment contract by conducting a speedy rulemaking to repeal its old enrichment criteria and to purportedly afford itself authority to deviate from the statutory full cost recovery requirement. DOE argued that the new criteria (which the agency admitted mirrored the new generic enrichment contract) mooted all issues with respect to the contract, including those relating to full cost recovery. The Tenth Circuit correctly noted that the substantive claims against the enrichment contract were not resolved by the new enrichment criteria and that the issues with respect to DOE's enrichment contract were accordingly not moot. 825 F.2d at 1434. The Tenth Circuit remanded for a finding on the standing of the uranium producers to contest the generic enrichment contract. 825 F.2d at 1437.

<sup>5</sup> This Court in *Power Reactor Dev. Co. v. International Union*, 367 U.S. 396, 408-09 (1961) noted the special deference due an interpretation of the Atomic Energy Act by the Atomic Energy Commission (DOE's predecessor) because of the close oversight of the Commission afforded by the Joint Committee. See also Green, *The Joint Committee on Atomic Energy: A Model for Legislative Reform*, 32 Geo. Wash. L. Rev. 932, 939 (1964).

its jurisdiction split among at least a half dozen Senate and House authorizing committees.

#### B. Cost Recovery under AEA § 161v.

AEA § 161v. provides that prices established for the civilian enrichment program "shall be on the basis of recovery of the Government's costs over a reasonable period of time . . . ." This language was specifically adopted by Congress in 1970 in affirmation of an opinion by the General Accounting Office (GAO) that DOE's predecessor, the Atomic Energy Commission, must recover the full costs of the civilian uranium enrichment program. These costs included depreciation of assets, imputed interest on the outstanding balance, and operating expenses.<sup>6</sup>

GAO has subsequently repeatedly indicated that under AEA § 161v. DOE is legally obligated to recover all program costs, and cannot take unilateral "write-off's." In an opinion letter dated December 27, 1984, GAO stated that

"After careful analysis of the statute . . ., [w]e conclude that a write-off for pricing purposes of undepreciated plant and capital equipment, so as to obviate the need for customer payments of related depreciation as part of the fee for enriching services, violates the statutory mandate of subsection 161(v) of the Atomic Energy Act of 1954, as amended, *supra*, requiring cost recovery for Energy's enrichment program."<sup>7</sup>

<sup>6</sup> See, e.g., *Uranium Enrichment Services Criteria and Related Matters, Hearings before the Jt. Comm. on Atomic Energy*, 88th Cong., 2d Sess. 31 (AEC statement that full cost recovery is required by statute even prior to 1970 amendment), 287-88 & 522 (proposed and final criteria embodying full cost recovery) (1966).

<sup>7</sup> GAO B-207463, Letter to Chairman R. Ottinger, Dec. 27, 1984, at p. 20.



When DOE issued its new written "enrichment criteria" in response to this litigation and in order to purportedly authorize a "write-off," GAO similarly ruled<sup>8</sup> that DOE's new criteria were beyond its authority in that they violated the full cost recovery provision in AEA § 161v.<sup>9</sup> GAO stated that "Energy is in legal error in this matter."<sup>10</sup> GAO explained that

"in the reports [H.R. Rep. No. 1470, 91st Cong., 2d Sess. 2 (1970); S. Rep. No. 1247, 91st Cong., 2d Sess. 2 (1970)] of the Joint Committee on Atomic Energy associated with the 1970 amendment, the Joint Committee explicitly affirmed a GAO legal interpretation [B-159687] of the meaning of subsection 161(v) as the Committee's intended meaning of the new statutory language requiring 'recovery of the government's costs over a reasonable period of time.' GAO's opinion required recovery of costs in every instance save one [which is not applicable here]. . . . Consequently, under the 1970 amendment to subsection 161(v) and its legislative history, full cost recovery is required."<sup>11</sup>

In a letter to Chairman Udall on April 14, 1987, GAO again reiterated that DOE has "written off" some \$4 billion in unrecovered enrichment costs "to reduce its

<sup>8</sup> GAO B-207463, Letter to Chairman Markey, Feb. 19, 1986, at p. 1, reprinted in *DOE Enrichment Program, Hearing before the Energy Cons. & Power Subcomm., Energy & Comm. Comm., 99th Cong., 2d Sess. 170 (1986)*.

<sup>9</sup> This ruling was foreshadowed in GAO's earlier December 27, 1984, opinion where GAO noted that DOE could not legalize a "write-off" by modifying the then-extant enrichment criteria: "If [Government enrichment] assets are to be written-off, Congress must amend the [Atomic Energy] Act. A criteria change would not suffice, since the criteria must be in accord with the statute." GAO Letter to Chairman Ottinger, *supra*, at p. 22.

<sup>10</sup> GAO B-207463, Letter to Chairman Markey, Feb. 19, 1986, at p. 3; 1986 Hearings, *supra*, at 172.

<sup>11</sup> GAO B-207463, Letter to Chairman Markey, *supra* at pp. 4-5, 1986 Hearings, *supra*, at 173-74.

enrichment price to what it believes to be a competitive level. However, we do not believe that under existing legislation DOE has the legal authority to do this."<sup>12</sup>

In sum, DOE lacks power to "write-off" unrecovered costs or to otherwise operate the civilian enrichment program on the basis of direct or indirect taxpayer subsidy. The General Accounting Office has repeatedly so determined. *Accord, United States v. Consolidated Edison Co. of New York*, 452 F. Supp. 638, 657 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 1122 (2d Cir. 1978) (DOE's uranium "enrichment program is required by statute to recover its costs").

DOE has nevertheless purported to "write-off" billions in unrecovered enrichment costs, has purported to include a "ceiling price" guarantee in its generic enrichment contract which unlawfully precludes recovery of these costs,<sup>13</sup> and has issued new "enrichment criteria" which purport to authorize it to "write-off" additional past costs, as well as costs incurred in the future.<sup>14</sup>

The basic dispute over DOE's legal obligation under AEA § 161v. to recover costs turns on the language and legislative history of the statute germane to these matters. As GAO has repeatedly pointed out, the statute and its history are clear and mandatory in this regard.

<sup>12</sup> Letter, GAO to Chairman Morris Udall, House Committee on Interior and Insular Affairs, April 14, 1987, at p. 5.

<sup>13</sup> For the reasons stated by GAO, the "ceiling price" provision is *ultra vires* and cannot bind the government. "[W]hen an agent of the government enters a contract that does not satisfy statutory or regulatory conditions, the courts cannot bind the government to the contract." *Augusta Aviation, Inc. v. United States*, 671 F.2d 445, 449 (11th Cir. 1982). See also *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 386 (1947).

<sup>14</sup> 51 Fed. Reg. 27133 (1986).



In the proceedings below, the uranium producers (Western Nuclear, et al.) have taken a similar position with respect to the language and intent of the separate uranium viability proviso in § 161v. In its opening Brief and in its Petition for Certiorari, DOE claims that the language of the viability proviso and its history do not support the uranium producers' position. On this basic legal dispute concerning the uranium viability proviso, NTU takes no view, except to note that for the reasons stated by GAO, DOE has an undeniable and mandatory duty to recover all other costs of the civilian enrichment program.

DOE, however, also raises a number of "policy" arguments for why it should be allowed to refuse to limit enrichment of foreign-source uranium. The agency in related litigation and in other contexts uses some of these arguments to support its position that it should not recover the costs of its enrichment program as well. For the reasons stated below, these "policy" concerns either are totally unsubstantiated or are irrelevant. They should not be credited by this Court.

#### SUMMARY OF ARGUMENT

DOE argues that the mandatory substantive requirement in AEA § 161v. requiring full cost recovery should be construed in non-mandatory fashion in order to facilitate the agency's efforts to price below-cost, to thereby subsidize enrichment service prices in a vain effort to maximize market share, and to pursue various other administrative goals. DOE offers similar arguments in response to the argument of the uranium producers that the agency must limit enrichment of foreign-source uranium for domestic end-use. DOE in both cases claims that it may lose business; that it can no longer implement the key substantive requirements of AEA § 161v. without such risk of business loss; and that all requirements of § 161v. should accordingly be construed as discretionary on the part of the agency.

DOE's current argument does not comport with the intent of Congress or constructions of the statute adopted by DOE's predecessor (the Atomic Energy Commission). With regard to full cost recovery, DOE lacks discretion to ignore the cost-recovery requirement in favor of unilateral engagement in forced subsidization of its program by taxpayers. In any event, market conditions are such that DOE cannot lose any significant business through implementation of substantive requirements of § 161v. and, even if serious losses were a reasonable possibility, the agency has ample power under various provisions of the AEA to require U.S. utilities to obtain enrichment services domestically in order to assure implementation of all substantive policy requirements of § 161v. If DOE wishes now to operate the federal government's enrichment program outside the substantive guidelines provided in AEA § 161v., it must seek a congressional repeal of that provision.

#### ARGUMENT

1. In support of DOE's view that its obligations under AEA § 161v. should be interpreted as discretionary rather than mandatory, the agency claims that actions such as limiting enrichment of foreign uranium for domestic end-use, or recovering Government enrichment costs may have the affect of raising DOE enrichment prices. This, the agency hypothesizes, may possibly cause some DOE enrichment customers to go to foreign enrichment suppliers for services. See, e.g., DOE opening Brief at 14-15,<sup>15</sup>

<sup>15</sup> Not surprisingly, nuclear utilities, which have an obvious economic interest in lowering nuclear fuel costs through federal subsidies if they can get away with it, make similar kinds of claims and protestations to encourage DOE, inter alia, to "write-off" costs and to charge below cost prices. There is a special irony involved here. Nuclear utilities, which all along have acknowledged an ultimate duty as DOE customers to bear the costs of the enrichment program, were strong supporters of the investments in new plant and equipment, the "write-off" of which they now demand of DOE. For example, in 1974, the utility trade association (Edison Electric

citing assertions in the 1986 rulemaking preamble.<sup>16</sup>

DOE's conjecture concerning losses is contrived, imaginary, and misleading. In any event, it is belied by the facts at several levels. First, the U.S. is, according to the former director of DOE's enrichment program, the lowest cost enrichment producer in the world with a virtual lock on the U.S. market (the world's largest).<sup>17</sup> Second, the U.S. dollar has depreciated significantly against the currencies not only of the other enrichment supplier nations (chiefly France through Eurodif/Cogema and Germany through Urenco) but also of foreign countries (e.g., Japan) which are potential enrichment purchas-

Institute), in urging more federal investment, testified that "the economic penalties that would be imposed by a shortfall of enrichment capability far exceed the costs that would be associated with temporary oversupply." *Future Structure of the Uranium Enrichment Industry, Hearings before the Jt. Comm. on Atomic Energy*, 93d Cong., 2d Sess. 175 (1974). Supporting the \$10 billion federal centrifuge enrichment program in 1978 against GAO objections, the utilities testified that "the need to proceed rapidly with the planned . . . plant is urgent and cannot be overemphasized." *Uranium Enrichment Policy, Hearings before the Energy Res. & Dev. Subcomm. of the Senate Energy & Nat. Res. Comm.*, 95th Cong., 2d Sess. 80, 87, 444 (1978). See also *id.* at 75 & 88 (full cost recovery admitted). The utilities continued support until further construction of the centrifuge was deferred in favor of development of yet another supposedly more promising enrichment technology. See *Uranium Enrichment Policy, Hearings before the Energy Cons. & Power Subcomm. of the House Energy & Power Comm.*, 98th Cong., 1st & 2d Sess. 315-26 (1983-84).

<sup>16</sup> DOE's reliance on the rulemaking is misplaced. None of the "evidence" DOE tries to derive from the rulemaking is part of the record below on the merits decisions by the district court. Moreover, reliance on the rulemaking is blatant bootstrapping. The agency has simply made unsubstantiated assertions in a preamble and then has cited those assertions in a Brief in another context.

<sup>17</sup> For example, "[DOE] now enjoy[s] the largest market share, lowest production cost, and most advanced technology development effort of any supplier." Letter, Dep. Assistant Sec'y Longenecker (enrichment) to DOE Secretary Herrington, August 4, 1987.

ers.<sup>18</sup> Third, there is insufficient capacity available abroad to support any significant diversion of business from DOE. The two European government enrichment consortia (which are Eurodif and Urenco) lack significant excess capacity according to publicly available data from DOE and analysts at the Congressional Budget Office (CBO).<sup>19</sup> Moreover, it would take 7 to 10 years for a foreign government to build significant additional capacity.<sup>20</sup> Countries which may elect to build new capacity will do so for political reasons (to secure domestic control over an energy resource) or for military purposes; and not because of current DOE prices.<sup>21</sup> In any event, it is crystal clear that at the current time and at least until the latter half of the next decade, DOE is and will

<sup>18</sup> Currency	1985 Av.	Feb. 25, 1988	%
franc (Eurodif)	8.985	5.709	-36.5
d-mark (Urenco)	2.944	1.687	-42.7
yen (Japan)	238.54	123.15	-46.3

<sup>19</sup> According to CBO numbers, which generally conform to DOE figures (see *Proceedings of the Tri-Committee Business Advisory Panel on Uranium Enrichment, Hearings before the Int. & Ins. Affairs Comm.*, 98th Cong., 2d Sess. 51-52 (1984)), there are 5 to 6 million SWU's per year of excess capacity in Europe in the late 1980's, eroding to 2 or 3 million SWU's by 1990. However, there are approximately 6 million SWU per year of "uncommitted demand" for that period. CBO, *U.S. Uranium Enrichment: Options for a Competitive Program* 15 (Eurodif and Urenco capacity static), 17 (Eurodif demand at 8 million SWU), & 14 (uncommitted demand) (1985). A more recent study by the Congressional Research Service (Library of Congress) indicates that foreign commitments and options already equal or exceed foreign supply capabilities. R. Civiak (CRS) to Senator Humphrey, at 1-2 (Feb. 24, 1988).

<sup>20</sup> E.g., *Proposed Changes in AEC Contract Arrangements for Uranium Enriching Services, Hearings before the Energy Subcomm. of the Jt. Comm. on Atomic Energy*, 93d Cong., 1st Sess. 24 (1973); Civiak (CRS), *supra*, at 3 (eight years for Urenco to add significant capacity).

<sup>21</sup> E.g., *Tri-Committee Business Panel, supra*, at 83 (testimony of Chairman of NUEXCO).



be the "marginal producer" with the only significant excess capacity available. As such, it possesses sufficient market power to establish higher prices for its services in order to carry out § 161v.

2. If DOE were to charge higher prices to recover its costs (or, by analogy, by limiting enrichment of foreign uranium for use in the U.S. in favor of more expensive domestic uranium), and if this were to cause a significant loss of business to DOE, the agency has a ready remedy: it can require U.S. utilities to purchase their enrichment services domestically, either directly or in conjunction with action by the Nuclear Regulatory Commission (which has licensing authority over, *inter alia*, civilian nuclear reactors and imports of enriched uranium). DOE tends to ignore this authority. However, the predecessor of the DOE and NRC, namely, the Atomic Energy Commission, repeatedly acknowledged that it possessed authority under the AEA to require domestic utilities to obtain their enrichment services from the Government enrichment program in order to maintain a viable domestic enrichment program, address foreign unfair competition, or otherwise implement AEA § 161v.<sup>22</sup> That the federal agencies possess broad power under provisions of the AEA like AEA §§ 161b, p., & i., 42 U.S.C. 2201b, p. & i., cannot be denied. *Westinghouse Elec. Corp. v. NRC*, 598

<sup>22</sup> E.g., *Private Ownership of Special Nuclear Materials, Hearings before the Legis. Subcomm. of the Jt. Comm. on Atomic Energy*, 88th Cong., 1st Sess. 29-30 (1963); *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use, Hearings before the Jt. Comm. on Atomic Energy*, 93d Cong., 2d Sess. at 8, 232-33 (1974). Although the Atomic Energy Commission was split into the Energy Research and Development Administration (ERDA) (later DOE) and NRC in 1974, nothing in that change altered the substantive authorities under the Atomic Energy Act, and both NRC and DOE share authority under key provisions such as AEA §§ 161b. & p., 42 U.S.C. 2201b. & p. See H.Rep. 93-707 at 27; S. Rep. 93-980 at 84 (1974) (reports on Energy Reorganization Act).

F.2d 759, 771 (3d Cir. 1979) (broad authority under referenced provisions). NRC has acknowledged in written answers to questions that it can act to limit importation of enriched uranium upon request by DOE in order to facilitate the latter's discharge of § 161v.<sup>23</sup> In short, DOE can implement full cost recovery under AEA § 161v., or take other required actions which might be viewed as raising prices, without risk of loss of business, because the government has ample authority to require domestic use of DOE enrichment facilities. DOE's claims about lack of such authority are revisionist in extreme; they are belied by the legislative history and by prior constructions of the statute by DOE's predecessor; and they are contrary to the position taken by DOE's sister agency. See *INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1221 n.30 (1987). DOE's claims that potential business loss might flow from implementation of AEA § 161v. simply cannot be credited.

3. DOE's position that compliance with AEA § 161v. should be subservient to other policy goals, such as, in the case of cost recovery, subsidized nuclear fuel prices, is ultimately an issue for Congress. DOE must obtain Congressional approval, in the form of an amendment to § 161v., to deviate from such a clearly expressed mandatory requirement as full cost recovery. In the meantime, the agency must take all available measures to comply with the statute. Put another way, DOE and the economic interests (such as the nuclear utilities appearing as amici in this proceeding) point to "problems" with the federal uranium enrichment enterprise. However, the statute unequivocally prohibits DOE from "solving" its problems at the expense of the U.S. taxpayer. To do that, Congress must amend the statute.

<sup>23</sup> Answers of NRC attached to Opposition to Emergency Motion for Stay filed by Amici States in the Tenth Circuit in the proceeding below.



**CONCLUSION**

DOE is unlawfully failing to recover the costs of its enrichment program in violation of AEA § 161v. Although this issue is not currently before this Court, it is one of the issues which will be dealt with on remand, and it is an issue in at least one other proceeding.<sup>24</sup> Resolution of this issue may turn on this Court's handling of the uranium viability proviso, and especially certain of DOE's arguments in connection with this proviso. In addressing the arguments in DOE's Brief, this Court is cautioned against reliance on any of the unsubstantiated claims made in DOE's bootstrapping preambles to its 1986 enrichment regulations, which are either legally incorrect or lack any factual or record basis, which are under judicial review elsewhere, and which in any event violate AEA § 161v. and are therefore matters for Congress.

Respectfully submitted,

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30 March 1988

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<sup>24</sup> See *Duke Power Co. v. Department of Energy*, 830 F.2d 359 (D.C. Cir. 1987) (transferring challenge to DOE's 1986 enrichment criteria to federal district court).

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

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*Petitioners*

v.

WESTERN NUCLEAR, INC., *et al.*,  
*Respondents*

On Writ of Certiorari  
to the United States Court of Appeals  
for the Tenth Circuit

BRIEF OF ELDORADO NUCLEAR LIMITED, AMOK LTD.,  
SASKATCHEWAN MINING DEVELOPMENT CORPORATION,  
URANERZ EXPLORATION AND MINING LTD., AND THE  
GOVERNMENTS OF THE PROVINCE OF SASKATCHEWAN  
AND THE PROVINCE OF ONTARIO  
AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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Saskatchewan and the Province of  
Ontario.

February 25, 1988

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

No. 87-645

F. CLARK HUFFMAN, *et al.*,  
*Petitioners*

v.

WESTERN NUCLEAR, INC., *et al.*,  
*Respondents***On Writ of Certiorari  
to the United States Court of Appeals  
for the Tenth Circuit****BRIEF OF ELDORADO NUCLEAR LIMITED, AMOK LTD.,  
SASKATCHEWAN MINING DEVELOPMENT CORPORATION,  
URANERZ EXPLORATION AND MINING LTD., AND THE  
GOVERNMENTS OF THE PROVINCE OF SASKATCHEWAN  
AND THE PROVINCE OF ONTARIO  
AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS**

Eldorado Nuclear Limited, Amok Ltd., Saskatchewan Mining Development Corporation, Uranerz Exploration and Mining Ltd. (the "Canadian producers") and the Governments of the Province of Saskatchewan and the Province of Ontario<sup>1</sup> respectfully submit this brief as *amici curiae* in support of the Solicitor General's petition seeking reversal of the judgment of the United States Court of Appeals for the Tenth Circuit, which upheld the decision of the District Court for the District of Colorado enjoining the Secretary of Energy from enriching foreign uranium. Both the petitioner and the respondents have consented to the filing of this brief, and the written consents have been filed with the Clerk of the Court.

<sup>1</sup>The Canadian producers and the Governments hereinafter are referred to collectively as "the Canadian Interests."

## STATEMENT OF INTEREST OF THE AMICI CURIAE

Canada is the largest producer and exporter of uranium in the Western world. It enjoys a comparative cost advantage in uranium with production from some of the world's richest uranium deposits at relatively low costs. The Canadian uranium industry produced approximately 32.4 million pounds of uranium in 1987, valued at approximately U.S. 800 million dollars. The Canadian producers appearing as *amici curiae* account for over sixty percent of total Canadian uranium production. The Provinces of Saskatchewan and Ontario obtain considerable revenues from the taxes and royalties charged to producers for the extraction and processing of uranium.

The United States is the world's largest commercial market for uranium. Canada is a reliable supplier of uranium to the United States, and the largest foreign supplier. More than one-third of Canadian uranium production is exported to the United States. The Canadian uranium industry has made substantial investments based in part on a reasonable expectation of continued access to the United States market.

The district court's injunction would restrict the flow of unenriched Canadian uranium into the United States and the flow of uranium in the international marketplace generally. If not overturned, the lower court's decision could also cause broader damage to the trade relationship between the United States and Canada, its largest trading partner. Recognizing the direct repercussions the lower court's decision would have upon the Canadian industry and United States-Canadian trade relations, the Government of Canada submitted a Diplomatic Note to the United States Department of State urging the United States to appeal the lower court's decision. (Diplomatic Note No. 194 from the Embassy of Canada, July 22, 1987, attached hereto as Appendix A.)

## STATEMENT OF THE CASE

Section 161(v) of the Atomic Energy Act of 1954, as amended, directs the Secretary of Energy ("the Secretary") to restrict enrichment of foreign uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry." 42 U.S.C. § 2201(v) (1982 & Supp. IV 1986). Pursuant to this authority, the Atomic Energy Commission (which then administered the statute) imposed restrictions on enrichment of foreign uranium in 1967; those restrictions were gradually phased out beginning in 1977, and were completely eliminated in 1984. Pursuant to Section 170B of the Atomic Energy Act (42 U.S.C. § 2210b), as amended, the Secretary submitted annual reports to the President and to the Congress stating that the domestic industry had not been viable in 1984 and 1985. He also concluded, however, that the domestic industry's difficulties were due to a variety of "structural weaknesses" unrelated to imports, and that the reimposition of restrictions on the enrichment of foreign uranium would do nothing to address these fundamental problems and would in no way "assure the maintenance of a viable domestic uranium industry." See Uranium Enrichment Services Criteria, 51 Fed. Reg. 27,132, 27,134, 27,138 (1986). Indeed, the Secretary determined that imposing restrictions was likely to be "counterproductive" because domestic utilities would be more likely to purchase enrichment services overseas, and these utilities would "almost certainly . . . purchase foreign uranium" as well. *Id.* at 27,136. The Secretary determined that restrictions on enrichment of foreign uranium should not be imposed in these circumstances.

The district court below ruled that Section 161(v) automatically requires the Secretary to restrict enrichment of foreign uranium whenever the domestic industry is not viable, even when to do so would not "assure the maintenance of a viable domestic uranium industry." On appeal, the Court of Appeals for the Tenth Circuit upheld the district court's decision. 825 F.2d 1430 (10th Cir. 1987).



## SUMMARY OF ARGUMENT

This is a simple case, with great practical importance. The language of Section 161(v) makes clear that the Secretary is not required to restrict enrichment of foreign uranium automatically if he determines that the domestic industry is not viable. Rather, the Secretary is instructed to do so only "to the extent necessary to assure" the viability of the domestic industry. The Secretary has specifically determined that restrictions on enrichment would be useless, indeed "counter-productive," and that they need not and should not be imposed under Section 161(v) at this time.

The Secretary's interpretation is supported by the legislative history of the statute and by precedent of this Court in a closely analogous case. The lower court's decision effectively rewrites Section 161(v), ignores both the specific factual findings of the agency entrusted to administer the statute and controlling precedent, and threatens vital trading relationships between the United States and Canada.

## ARGUMENT

### A. SECTION 161(V) ON ITS FACE DOES NOT REQUIRE THE SECRETARY TO RESTRICT AUTOMATICALLY ENRICHMENT OF FOREIGN URANIUM

Section 161(v) must first be interpreted by examining the plain language of the statute itself. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976).

Section 161(v) requires that the Secretary "to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer [uranium enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States." 42 U.S.C. § 2201(v) (1982 & Supp. IV 1986) (emphasis added).

The statute does not require the Secretary to blindly impose unwarranted or futile restrictions that will not

assure the viability of the domestic uranium industry. Instead, Section 161(v) directs the Secretary to restrict enrichment only "to the extent necessary to assure" the viability of the domestic industry.

The lower court's interpretation of the statute would strip the Secretary of the authority to determine whether restrictions would serve any purpose, and instead would require "that when domestic nonviability is determined, restrictions on enrichment of foreign source uranium *must* be imposed..." 825 F.2d at 1438-39 (emphasis added). The lower court's interpretation rewrites the statute. Section 161(v) does not impose an automatic requirement that the Secretary restrict enrichment of foreign uranium whenever the domestic industry is not viable. Congress could have imposed such a mandatory trigger. For example, Congress could have directed that "the Secretary shall not offer enrichment services for foreign source uranium whenever he determines that the domestic uranium industry is nonviable."

Indeed, Congress *did* impose such automatic directives in other provisions of the Act.<sup>2</sup> These other provisions contrast markedly with Section 161(v), which requires the Secretary to restrict enrichment of foreign uranium only "to the extent necessary to assure" the viability of the domestic industry.<sup>3</sup> The plain language of Section 161(v)

<sup>2</sup> For example, Section 170B(d) of the Act, as amended, directs the United States Trade Representative to request an "escape clause" investigation if the Secretary determines that the domestic uranium industry is seriously injured or threatened by excessive imports. See 42 U.S.C. § 2210b(d). And Section 170B(e)(1) requires the Secretary to request the Secretary of Commerce to initiate a "national security" investigation if he determines that imports of uranium account for greater than 37.5 percent of domestic requirements for two consecutive years. See 42 U.S.C. § 2210b(e)(1).

<sup>3</sup> The legislative history supports this interpretation. Congress "did not consider it appropriate to place an embargo or other statutory restriction on the importation of foreign uranium," but determined that it "would be reasonable to place restrictions upon the performance of [enrichment] services... where the enrichment of foreign



makes clear that Congress declined to impose an automatic trigger but instead left it to the Secretary's expertise to determine whether restrictions are "necessary" to assure the viability of the domestic industry.<sup>4</sup>

**B. THE LOWER COURT'S DECISION CANNOT BE RECONCILED WITH THIS COURT'S DECISION IN A CLOSELY ANALOGOUS CASE**

Even if Section 161(v) could be considered ambiguous, the lower court's decision conflicts directly with this Court's recent holding in *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986). In *Young*, the relevant statute directed that the Food and Drug Administration (the "FDA") "shall promulgate regulations limiting the quantity therein or thereon [of carcinogens] to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe. . . ." 21 U.S.C. § 346 (1982 & Supp. IV 1986) (emphasis added). The FDA had determined that it was not required to promulgate regulations if those regulations were not necessary to protect the public health. Respondents argued—as does the domestic industry in the present case—that the phrase "to such extent as [it]

(footnote continued from preceding page)

material would have an adverse effect on the domestic uranium industry." S. Rep. No. 1325, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. Code Cong. & Ad. News 3105, 3121 (emphasis added). Here the Secretary has determined that enrichment of foreign uranium does not have an adverse effect on the domestic uranium industry and that restrictions therefore would do nothing to assist the domestic industry. 51 Fed. Reg. at 27,138. Restrictions therefore need not be imposed.

<sup>4</sup>The lower court's reading also could lead to absurd results. Under the lower court's view of Section 161(v), the Secretary would be required to restrict enrichment of foreign uranium even if all domestic uranium reserves were exhausted. The United States would then be prohibited from providing any enrichment services. The Court cannot assume that Congress could have intended such an absurd result. See, e.g., *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("[A]bsurd results are to be avoided" when interpreting statutes).

finds necessary" qualified only the amount of the restrictions to be imposed, not whether restrictions should be imposed at all. This Court ruled that because the FDA's interpretation was "sufficiently rational" a reviewing court was precluded from substituting its own judgment for that of the agency. 476 U.S. at 981.

That same analysis controls this case. The Secretary has interpreted his obligations under Section 161(v) in a manner consistent with the plain language of the statute and his determination that if restrictions will not benefit the domestic uranium industry they can hardly be "necessary."<sup>5</sup> The Secretary's rational interpretation must be upheld in these circumstances. *Young, supra*; *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("the question for the court is whether the agency's answer is based on a permissible construction of the statute").

The lower court's attempts to distinguish *Young* are unavailing.

First, the word "shall" appears in both statutes, undercutting the lower court's analysis that that term imposes a mandatory trigger in this case. 825 F.2d at 1438.

Second, the lower court summarily concluded that the qualifying phrase in Section 161(v), "to the extent necessary to assure the maintenance of a viable domestic industry," only informs the Secretary of the amount of the restrictions to be imposed. *Id.* at 1438. In Section 161(v),

<sup>5</sup>Respondents argue that the Secretary's interpretation of Section 161(v) addressed only whether restrictions by themselves "would be sufficient" to assure the viability of the domestic industry, rather than whether such restrictions were "necessary." (Brief for Respondents in Opposition at 13.) This is incorrect. The Secretary did not conclude that restrictions should not be imposed merely because by themselves they would be "insufficient." Rather, after recognizing that under Section 161(v) he "must answer the question whether restrictions are 'necessary' . . .," 51 Fed. Reg. at 27,134, he concluded that restrictions would "do nothing" to assist the domestic industry and would in fact be "counterproductive." *Id.*

however, the qualifying phrase "to the extent necessary" immediately precedes the word "shall," whereas in *Young* the two phrases were not connected. 476 U.S. at 981. Therefore, if anything, the Secretary's interpretation of Section 161(v) is even more reasonable and permissible than that of the FDA in *Young*.<sup>6</sup>

*Third*, Section 161(v) on its face undercuts the lower court's reasoning that here the "unambiguous language of the statute" precludes deference to the Secretary's interpretation under *Young*. 825 F.2d at 1438. As noted above, the statute plainly does not require the Secretary to impose automatically restrictions when the domestic industry is not viable.<sup>7</sup> In fact, it clearly supports the Secretary's interpretation. At most, the statute is ambiguous, the Secretary's interpretation is "sufficiently rational," and *Young* controls.

*Finally*, the lower court reasoned that, unlike the situation in *Young*, here the Secretary "proposed to abandon the statutory goal." *Id.* at 1439. In fact, the Secretary has never abandoned the statutory goal, nor even challenged it. Rather, the Secretary has determined that restrictions at this time would be pointless and would do nothing to assure the viability of the domestic industry.

<sup>6</sup>In addition, Section 161(v) contains no language indicating the level of restrictions to be imposed. In *Young*, by contrast, the statute might reasonably have been read to qualify only the level of controls to be imposed because it required the FDA to "promulgate regulations limiting the quantity therein . . . to such extent as he finds necessary . . . and any quantity exceeding the limits so fixed shall also be deemed to be unsafe. . . ." 21 U.S.C. § 346 (emphasis added). Thus, there is even less reason here than in *Young* to presume that the phrase "to the extent necessary" in Section 161(v) only modifies the amount of restrictions to be imposed.

<sup>7</sup>The lower court also improperly substituted its opinion with respect to the underlying facts for that of the Secretary. The lower court reasoned that restrictions must be imposed "until the domestic industry is rejuvenated and becomes viable." 825 F.2d at 1439. This ignores the Secretary's specific factual findings that restricting enrichment of foreign uranium will not assist the domestic industry. 51 Fed. Reg. at 27,138.

### C. IF UPHELD, THE LOWER COURT'S DECISION WILL ADVERSELY AFFECT CRITICAL UNITED STATES-CANADIAN TRADE RELATIONS

In addition to the plain language of Section 161(v) and the reasoning in *Young*, the adverse consequences of an erroneous interpretation of Section 161(v) are also relevant when interpreting the statute. If upheld, the lower court's decision will adversely affect the Canadian uranium industry and United States-Canadian trade relations generally.

The district court's injunction unilaterally reverses United States trade policy toward Canada. The United States Trade Representative has concluded that restrictions on enrichment of foreign uranium would have "an adverse impact on our trade and other relationships with important trading partners without resolving the long-term problems of the industry."<sup>8</sup> Similarly, the Office of the United States Trade Representative submitted a declaration to the district court stating that entry of the injunction "will have major adverse effects on the trade policy of the United States," and that the injunction "would be particularly damaging to trade relations with Canada."<sup>9</sup>

The Canadian Government has also concluded that the lower court's decision threatens important trading relationships. In a Diplomatic Note submitted to the Department of State, the Government of Canada stated that the lower court's decision "will severely disrupt Canadian exports of uranium to the United States, will have harmful implications for the international uranium market, and will give rise to major trade irritants between the

<sup>8</sup>Letter from United States Trade Representative Clayton Yeutter to Secretary of Energy John Herrington, Dec. 26, 1986, quoted at 51 Fed. Reg. 27,137.

<sup>9</sup>Declaration of Robert A. Reinstein, Director of Energy Trade Policy, Office of the United States Trade Representative, June 13, 1986, attached as Appendix B at 2b.



United States and its current suppliers of uranium." The Government of Canada also informed the Department of State that restrictions on the enrichment of foreign uranium under Section 161(v) would be "clearly inconsistent" with the United States' obligations under the General Agreement on Tariffs and Trade.<sup>10</sup> The Office of the United States Trade Representative agreed, stating that a ban on enrichment of foreign uranium "would be subject to legal challenge under the General Agreement on Tariffs and Trade."<sup>11</sup>

In addition, the Government of Canada has stated that the imposition of new restrictions on the enrichment of foreign uranium "would be completely at odds with current efforts to negotiate a free-trade agreement between our two countries."<sup>12</sup> The United States and Canada recently signed a comprehensive Free-Trade Agreement which provides, *inter alia*, that "the United States of America shall exempt Canada from any restrictions on the enrichment of foreign uranium under Section 161(v) of the Atomic Energy Act." (Canada-United States Free-Trade Agreement, December 9, 1987, Annex 902.5(1).)<sup>13</sup>

<sup>10</sup> Diplomatic Note from the Embassy of Canada, July 22, 1987, Appendix A at 1a (hereinafter "Diplomatic Note").

<sup>11</sup> Declaration of Robert A. Reinstein, *supra* note 9. Article III of the General Agreement on Tariffs and Trade prohibits member nations from regulating the internal sale or use of foreign goods in a manner less favorable than that accorded to like products of domestic origin. General Agreement on Tariffs and Trade, October 30, 1947, art. III, 61 Stat. (pt. 5) A3, T.I.A.S. No. 1700, 55 U.N.T.S. 194, as amended. The lower court's injunction would contravene Article III by prohibiting the Secretary from enriching foreign uranium while permitting him to continue to enrich domestically-produced uranium.

<sup>12</sup> Diplomatic Note, Appendix A at 1a.

<sup>13</sup> See Appendix C. While the Agreement was signed by President Reagan and Prime Minister Mulroney on January 2, 1988, it still must be approved by the United States Congress and by the Canadian Parliament. Moreover, if it is approved, the Agreement will not take effect until January 1, 1989, so that affirmance of the lower court's decision would disrupt Canadian uranium trade and production at least until that date. Finally, even if and when the Agreement is

(footnote continued on next page)

The conflict between the lower court's interpretation of Section 161(v) and the letter and spirit of the Free-Trade Agreement should be taken into account when interpreting that statute.

Section 161(v) should be interpreted in a manner consistent with the United States' international obligations. The lower court's rewriting of Section 161(v) in contravention of the language of the statute and this Court's precedent amounts to an unwarranted judicial reversal of the Executive Branch's trade policy toward its largest trading partner.

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(footnote continued from preceding page)

implemented, the lower court's decision will threaten the United States' trading relationships with other important trade partners, most notably Australia.



**CONCLUSION**

For the foregoing reasons, the Canadian Interests respectfully urge that the Court reverse the decision of the court below.

Respectfully submitted,

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of Ontario.

February 25, 1988

**APPENDIX A****Canadian Embassy      Ambassade du Canada****Note no. 194**

The Embassy of Canada presents its compliments to the Department of State and has the honour to refer to a decision of July 20, 1987, in the United States Court of Appeals for the Tenth Circuit to provide relief to the United States' domestic uranium industry based on Section 161(v) of the Atomic Energy Act of 1954. The court has concluded that the previous decision of the United States District Court for the District of Colorado was correct with respect to the statutory obligation under Section 161(v), and has affirmed that injunctive relief was appropriate by enjoining the Department of Energy to limit the enrichment of uranium of foreign origin destined for use within the United States. The result of this decision is that there is now in effect a complete ban on the enrichment of foreign uranium in the United States.

It is the view of the Government of Canada that the decision, should it remain in force, will severely disrupt Canadian exports of uranium to the United States, will have harmful implications for the international uranium market, and will give rise to major trade irritants between the United States and its current suppliers of uranium. In addition, restricting the United States market to only domestic uranium would be completely at odds with current efforts to negotiate a free-trade agreement between our two countries, contrary to declarations against protectionism made at Punta del Este, and clearly inconsistent with the United States' GATT obligations.

Canada will be the foreign supplier most adversely affected by this restriction. Canada is a reliable, fair and competitive supplier of uranium to many countries and is, by far, the largest foreign supplier to the United States. One-third of Canadian uranium production is exported to meet the requirements of United States power utilities.

These sales, which exceeded \$200,000,000 in 1985, represent nearly 70 percent of total U.S. uranium imports.

It must be recognized that, to the extent United States utilities choose not to purchase enrichment services abroad, the affirmation of the lower court's decision represents a total embargo on imports of uranium from Canada. The Canadian government is very concerned to see the world's largest market for uranium once again protected by unilateral non-tariff [sic] barriers as it was during the period from 1967 to 1984.

The Government of Canada urges the Government of the United States to appeal this court decision so that unrestricted access for foreign uranium will be restored. If it is found that this decision cannot be appealed, the Government of Canada would urge that all legislative and administrative avenues be actively explored to effect the elimination, or at least the significant reduction, of this unilateral import restriction.

The Embassy of Canada takes this opportunity to renew to the Department of State the assurances of its highest consideration.

[Signed and Sealed  
with Embassy seal]

July 22, 1987  
Washington, D.C.

## APPENDIX B

### UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

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WESTERN NUCLEAR, INC., *et al.*,  
*Plaintiffs,*

v.

F. CLARK HUFFMAN, *et al.*,  
*Defendants.*

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Civil Action No. 84-2315

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### DECLARATION OF ROBERT A. REINSTEIN

I, Robert A. Reinstein, declare and say:

1. Since February 1982 I have been the Director of Energy Trade Policy, Office of the United States Trade Representative, Executive Office of the President. From 1975 to 1982 I was employed by the Federal Energy Administration (FEA) and the U.S. Department of Energy (DOE), which the FEA became part of in October 1977. From 1978 to 1981 I was Director of Economic and Data Analysis for DOE's Economic Regulatory Administration, serving in effect as the chief analyst for DOE's regulatory programs. In my current position I am responsible for coordination of Administration trade policy for energy and related sectors. In this capacity, I chair a number of interagency subcommittees and working groups, including the Energy Trade Policy Subcommittee of the Trade Policy Staff Committee and the interagency Uranium Working Group. I make the following statements based upon my personal knowledge and belief and upon other information conveyed to me by my advisors in the course of my official duties.



2. I am familiar with the above-referenced litigation. I have reviewed plaintiffs' proposed order, which would enjoin the DOE from enriching source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States until the viability of the domestic uranium industry is assured. I have also reviewed the declaration of James B. Devine, Department of State, setting forth the negative foreign policy implications of plaintiffs' proposed order.

3. I understand that in determining whether to issue an injunction it is appropriate to consider the public interest, including the foreign policy and the trade policy interests of the United States. I submit this declaration to advise the Court that entry of an injunction [sic] such as plaintiffs [sic] propose will have major adverse effects on the trade policy of the United States.

4. The Office of the United States Trade Representative has collaborated with numerous other government agencies in conducting an in-depth investigation of conditions in the domestic uranium mining and milling industry. This investigation indicated that a ban on enrichment of foreign uranium is highly unlikely to render the domestic industry "viable" in any meaningful sense. On the contrary, any such restriction would discriminate against foreign suppliers of unenriched uranium and would impair the United States [sic] trading relations with some of our most important trading partners.

5. An injunction against enrichment of foreign uranium would be particularly damaging to trade relations with Canada. Canada is our largest trading partner and is also a major supplier of unenriched uranium. A ban on U.S. enrichment of Canadian feedstock would force U.S. utilities with contracts for Canadian supplies to seek enrichment services in Europe at substantially higher transportation costs. This would impair Canadian access to and competitiveness in the U.S. market and very likely

depress the price of Canadian uranium in world markets. The Canadian leadership and media will interpret such a move as a significant new trade barrier, and will vociferously object. Indeed, they have already informally expressed strong concerns on this issue.

6. Plaintiffs' proposed injunction would be especially harmful at the present time. The United States and Canada have just begun negotiations towards a bilateral trade arrangement whereby both sides are seeking to remove substantially all barriers to bilateral trade in goods and services. To erect a new trade barrier at the very outset of these negotiations—without economic justification—could be construed in Canada as evidence that the U.S. government lacks genuine interest in free trade and/or lacks the ability to provide promised benefits under a free trade agreement. Such a perception would erode the base of public support for this high-visibility initiative of the current government in Canada, and complicate the task of negotiators on both sides.

7. New enrichment restrictions on foreign uranium would also seriously interfere with on-going, parallel negotiations to secure removal of certain Canadian trade barriers affecting the uranium processing industry. It is difficult to argue that Canada should remove barriers to free trade in uranium products at the same time that we are adding barriers of our own.

8. A ban on enrichment of foreign uranium would harm the commercial interests of other major trading partners such as Australia. Such a ban would be subject to legal challenge under the General Agreement on Tariffs and Trade (GATT). GATT Article III broadly prohibits member nations from adopting rules or regulations which affect the internal sale, distribution or use of goods, and which discriminate against foreign suppliers of such goods. Even if the stated ban were considered defensible under the national security exception of GATT Article XXI, the United States might be found to owe compensation to our trading partners for the "nullification or

impairment" of their benefits under the GATT. In this case, other sectors of the U.S. economy would be asked to make sacrifices for any short-term relief provided for the uranium industry.

9. For all the foregoing reasons, I have concluded that implementation of an injunction against U.S. enrichment of foreign uranium would have major adverse effects on pending trade negotiations and on the trade policies of the United States.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 13, 1986.

[Signed]  
Robert A. Reinstein

**APPENDIX C  
EXCERPTS FROM  
CANADA-UNITED STATES  
FREE-TRADE AGREEMENT**

**FINAL TEXT  
DECEMBER 9, 1987**

**OBJECTIVES**

The objectives of this Agreement, as elaborated more specifically in its provisions are to:

- (a) eliminate barriers to trade in goods and services between the territories of the Parties;
- (b) facilitate conditions of fair competition within the free-trade area;
- (c) liberalize significantly conditions for investment within this free-trade area;
- (d) establish effective procedures for the joint administration of this Agreement and the resolution of disputes; and
- (e) lay the foundation for further bilateral and multi-lateral cooperation to expand and enhance the benefits of this Agreement. . . .

**NATIONAL TREATMENT**

Each Party shall, to the extent provided in this Agreement, accord national treatment with respect to investment and to trade in goods and services. . . .

**ANNEX 902.5****Import Measures**

1. The United States of America shall exempt Canada from any restriction on the enrichment of foreign uranium under section 161v of the *Atomic Energy Act*. . . .

**STANDSTILL**

The Parties recognize that this Agreement is subject to domestic approval procedures. Accordingly, both Parties understand the need to exercise their discretion in the period prior to entry into force so as not to jeopardize the approval process or undermine the spirit and mutual benefits of the Free Trade Agreement."